IN THE

Supreme Court of the United States

OCTOBER TERM, 1944.

No. 507.

INTERSTATE COMMERCE COMMISSION, THE WILLETT COMPANY OF INDIANA, INC., AND THE PENNSYLVANIA RAILROAD COMPANY, APPELLANTS,

v.

HARRY A. PARKER, DOING BUSINESS AS PARKER MOTOR FREIGHT, REGULAR COMMON CARRIERS CONFERENCE OF THE AMERICAN TRUCKING ASSOCIATIONS, INC., ET AL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF INDIANA.

BRIEF OF APPELLANTS, THE WILLETT COMPANY OF INDIANA, INC., AND THE PENNSYLVANIA RAILROAD COMPANY.

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OPINIONS BELOW.

No opinion was filed by the specially constituted District Court. Its findings of fact and conclusions of law (R. 43-46) are not officially reported. The report of the

Interstate Commerce Commission (R. 6-14) appears in Volume 42 of the Interstate Commerce Commission's Reports of its Motor Carrier Cases, at page 721 (42 M. C. C. 721).

JURISDICTION.

The final decree of the District Court was entered on June 30, 1944 (R. 46). The petition for appeal was presented on August 22, 1944 (R. 46-47), and was allowed the same day (R. 49). The jurisdiction of this Court is invoked under the Urgent Deficiencies Act of October 22, 1913, c. 32, 38 Stat. 208, 219, 220-21 (28 U. S. C., secs. 41(28), 44, 47, 28 U. S. C. Supp. VII, Sec. 47(a)), and Section 238 of the Judicial Code as amended by the Act of February 13, 1925, c. 229, 43 Stat. 936-38 (28 U. S. C. Supp. VII, Sec. 345). Probable jurisdiction was noted by this Court on November 6, 1944 (R. 918).

STATUTE INVOLVED.

The statute here involved is the Interstate Commerce Act, particularly Part II thereof, also known as the Motor Carrier Act of 1935. The provisions of the Act which are specifically involved herein are set forth in the appendix to this brief, at pages 1a-8a thereof.

STATEMENT.

This case grows out of an application which appellant, The Willett Company of Indiana, Inc. (R. 59), a wholly-owned subsidiary of The Pennsylvania Railroad Company (R. 145), also an appellant herein, filed with

the Interstate Commerce Commission under Sections 206 (a) and 207 (a) of Part II of the Interstate Commerce Act as amended (49 Stat. 551). The application was for authority to engage in so-called "substituted motor freight service" over certain highway routes in Indiana and Michigan, parallel to the lines of the Pennsylvania Railroad, serving only stations of the Pennsylvania Railroad, and transporting in interstate commerce general commodities under freight bills, bills-of-lading and tariffs of the Pennsylvania Railroad (R. 59-71).

The service proposed is generally known as "substituted motor freight service in lieu of railroad local peddler cars." The application was for leave to conduct such service over seven different routes, the object being to handle locally less-than-carload freight moving via the Pennsylvania Railroad for the purposes: (1) to expedite the shipments of patrons of the Pennsylvania Railroad, both inbound and outbound; (2) to effect operating economies for the railroad; (3) to eliminate unessential use of box cars; and (4) to expedite the movement of carload freight in the territory involved (R. 90).

The appellant Willett Company, which is exclusively engaged in providing motor truck service for the Pennsylvania Railroad (R. 162), already operates for the Pennsylvania a service similar to that here proposed, over twenty-five routes in Indiana and adjacent States, under Interstate Commerce Commission authority and local State authority (R. 86). The present application involves merely an extension of the same type of service to points on the line of the Pennsylvania Railroad between Fort Wayne, Indiana, and Mackinaw City, Michigan, where this service is not now being provided (R. 93).

The case was duly heard under the statutory procedure (Sec. 205 of the Act, 49 Stat. 548) before a "Joint State Board," assisted by an examiner of the Interstate Commerce Commission (R. 72), and a proposed report was issued recommending, in substance, the granting of the

application (R. 727). Exceptions were filed to the report by protestant motor carriers (R. 734, 792, 801), following which Division 3 of the Interstate Commerce Commission affirmed and adopted the substance of the proposed report and granted the application (R. 6). A petition filed by protestant motor carriers for reopening, reconsideration and other relief was denied by the Commission (R. 916). Protestant motor carriers thereupon instituted this suit before a statutory three-judge court for the Southern District of Indiana (R. 1). Hearing was held by that court, at which the only evidence consisted of the record made before the Commission (R. 44-45). Following this hearing, the court entered an order enjoining and setting aside the order of the Commission (R. 43-46), without opinion.

It is from this order of the three-judge district court that The Willett Company of Indiana, Inc., applicant in the original case, The Pennsylvania Railroad Company, intervenor before the Commission and in the court below, the Interstate Commerce Commission, and the United States of America are now appealing (R. 46-47).

The Commission in granting the application (R. 6) held substantially that the applicant had established public convenience and necessity for the proposed operation as required by the Interstate Commerce Act, and that the applicant was therefore entitled to a certificate of public convenience and necessity. In its order, the Commission stated the following conclusion (R. 12):

> "We find that the present and future public convenience and necessity require operation by applicant as a common carrier by motor vehicle, in interstate or foreign commerce, of general commodities, between the points and over the routes shown in the appendix hereto, serving intermediate and off-route points which are stations on the rail line of The Pennsylvania Railroad Company, subject to the following conditions:

"1. The service to be performed by applicant shall be limited to service which is auxiliary to, or supplemental of, rail service of The Pennsylvania Railroad Company, hereinafter called the railroad.

"2. Applicant shall not serve any point not a station on the rail line of the railroad.

"3. No shipments shall be transported by applicant as a common carrier by motor vehicle between any of the following points, or through or to or from more than one of the said points: Fort Wayne, Ind., and Grand Rapids, Mich.

"4. All contractual arrangements between applicant, the railroad, and the American Contract and Trust Company,* shall be reported to us and shall be subject to revision, if and as we find it necessary in order that such arrangements shall be fair and equitable to the parties.

"5. Such future specific conditions as we, in the future, may find it necessary to impose in order to restrict applicant's operation to service which is auxiliary to, or supplemental of, rail service."

The findings and order of the Commission were based upon testimony presented before the Joint Board to the following effect:

The underlying purpose of the application is to improve and supplement the service of the Pennsylvania Railroad to its patrons through the utilization of motor trucks in substitution for local way freight service by rail. As stated by Witness Christie, Supervising Agent of the,

*The American Contract and Trust Company is a wholly-owned subsidiary of The Pennsylvania Railroad Company, and all the stock of the Willett Company of Indiana, Inc., is owned by the American Contract and Trust Company (R. 145-46).

Pennsylvania Railroad specially assigned to the problem of utilization of motor trucks to supplement the railroad's service (R. 85, 90):

> "The purpose of The Pennsylvania Railroad in this matter is to supplement the rail service, by truck service, in order that we may expedite the movement of freight for the patrons of the railroad; to make it a more economical operation; and to eliminate the use of box cars which will result in heavier loading of cars on our railroad."

The proposed substituted motor vehicle service will result in expediting service, inbound and outbound, to Pennsylvania Railroad patrons by twenty-four to forty-eight hours (R. 98-105; Ex. No. 6, R. 428). There are instances where a local freight train operates on a tri-weekly basis, *i. e.*, in one direction three days a week, and in the reverse direction three other days a week. Under the proposed operation daily service will be afforded in both directions (R. 116). Also in many instances the volume of freight is so light that it does not justify the use of a box car to a particular local point, and the freight has to be held over in the freight house for one or two days. Under the proposed operation, this freight will move out promptly day by day (R. 117).

Railroad operating economies which will result from instituting the proposed service come under a number of different headings. Witness Christie explained these (R. 362-64), which may be summarized as follows:

Saving in car miles
Saving in overtime
Saving in locomotive expense
Saving in the stowing of freight
Saving in yard switching
Saving in second handling of freight
Saving in engine expense
Saving in box car use.

This witness also stated that the direct out-of-pocket savings to the railroad would amount to more than the total cost to the Willett Company for performing the truck service (R. 388).

A very substantial saving would be brought about as a result of a material decrease in the use of box cars which in local way freight service are generally very lightly loaded. It has been shown by experience that the average loading in box cars of less-than-carload freight has improved very materially as a result of the use of substituted service by truck. For example, in 1937 the average load was only 2.84 tons per car. In 1941, the average load was 7.97 tons per car, and at times the average load on certain runs has gone as high as 8.63 tons per car (R. 91). In addition to the increase in the average load per car, and the resulting efficiency in the utilization of railroad equipment, the release of box cars for use in carload business has become increasingly important, not only in connection with service to private industry in ordinary times, but for the national defense (R. 91). The orders of the Office of Defense Transportation in this respect, designed to make possible the maximum utilization of railroad equipment, are matters of public knowledge.

By elimination of local way-freight merchandise or "peddler" cars, service to Pennsylvania Railroad patrons can be very much improved in connection with car-load movements. Under all-rail operations these cars have to be handled in the same trains with cars of car-load freight, and it is a difficult matter to make a schedule for local freight trains that will best serve the convenience of both car-load shippers and less-than-carload shippers at the same time (R. 123). By eliminating the way-freight or "peddler" cars from the local freight trains, the railroad is enabled to schedule local freight trains hauling car-load freight in the way best calculated to serve the convenience of car-load patrons, both inbound and outbound, and this is also of importance in making connections at interchange points with other trains (R. 123).

By the utilization of motor trucks in substitution for local way-freight or "peddler" cars, the result will be not only to expedite service to patrons of the railroad and to effect operating economies, but also to coordinate the service of the Pennsylvania Railroad and the service of The Willett Company of Indiana into a closer relationship, and at the same time the services of the Pennsylvania Railroad will be supplemented by the use of motor trucks (R. 124).

The record indicates (R. 95, Ex. 5, R. 427) the estimated tonnage to be handled under the proposed operation, based on a study of present tonnage movement and probable future movements. The record also shows that commodities generally will be hauled but limited to less-than-carload freight to the exclusion of car-load freight (R. 92-93).

All freight to be handled in the proposed operations will be less-than-car-load freight moving under railroad way-bills, railroad bills-of-lading, and railroad tariffs. All freight will originate as railroad freight. It will not originate as truck freight (R. 92, 106-7). All relations with shippers and consignees will be on the part of The Pennsylvania Railroad Company. The Willett Company of Indiana will have no direct contact with the shipper or consignee, and will not use any bills-of-lading or file any tariffs quoting rates to the general public. It will merely handle railroad freight between stations of the railroad as it now does on the existing duly authorized twenty-five routes over which it already operates in the same type of service (R. 106-107). The only tariff publication by The Willett Company of Indiana, and by The Pennsylvania Railroad Company, with respect to this operation, will consist of the naming of the new routes, and the listing of the Willett Company and the railroad in a tariff known as Kipp's Directory, generally designated as National Substituted Freight Service Directory 1A, in conformity

with the ruling of the Interstate Commerce Commission in *Substituted Freight Service, Ex Parte 129*, 232 I. C. C. 683 (1939) (R. 108-110).

The testimony of witnesses for The Pennsylvania Railroad Company was to the effect that the railroad preferred operation in the proposed service by The Willett Company of Indiana, or some other motor carrier subsidiary of the Pennsylvania, to the exclusion of independent truckers, and regarded the use of the latter as impracticable (R. 124-25, 143). The railroad has in all other cases of a similar character sought to present oral evidence as to the reasons for this preference, but in the instant case the Joint Board excluded such testimony as irrelevant, upon objection by protestants (R. 364, 367). In connection therewith, counsel for The Willett Company of Indiana made an offer of proof outlining the most substantial reasons (R. 365-366).

The Pennsylvania Railroad is utilizing an independent operator serving two of the points involved in the pending operation, namely, Cadillac, and Lake City, Michigan. These two points are not being satisfactorily served, and the Pennsylvania Railroad desires the service of the Willett Company in order to expedite service to the railroad's patrons and render a more generally satisfactory service in connection with rail operations (R. 390-391). Other evidence showed that none of the existing independent operators who protested the application served all of the points in question on the railroad's line which would be served by the applicant (R. 442-43, 518, 598-99, 637-38, 647-48, 651-53, 656-58, 662). There was also evidence to the effect that existing operating schedules of independent motor carriers would not fit properly into connecting rail movements, and that substantial rearrangements would be essential for proper coordination (R. 637-38, 652-53).

The applicant presented forty-two shipper witnesses, four of whom testified orally (R. 239-309), while the testimony of the other thirty-eight was inserted in the record

by stipulation of the parties, in accordance with the practice usual in such cases (R. 309).

The four shipper witnesses who actually testified presented evidence on direct and cross-examination to the general effect that they were in business on the line of the Pennsylvania Railroad which would be served by the proposed substituted service, and had been patrons of the Pennsylvania Railroad for a good many years with respect to both inbound and outbound shipments (R. 240-44, 262-66, 290-91, 302-4). They desire to continue to use the Pennsylvania Railroad, particularly for the longer hauls, and any improvement in service offered by the Pennsylvania Railroad would be beneficial to them, and in fact is becoming more and more of a necessity to them in order to meet the competition of other persons in the same line of business, particularly those located on the main through lines of the Pennsylvania and other railroads (R. 261, 266, 268, 273, 304).

As to existing and presently available truck service by independent motor carriers, they testified generally that local truck service was for the most part satisfactory, but that truck service for the longer hauls was not satisfactory, and they preferred to use transportation offered by rail for the longer hauls, some of which extended to points in various parts of the country, both on inbound and outbound trips (R. 244, 265-67, 270-72). Anything that would improve from their standpoint the efficiency of rail service would be of very great convenience to them, as well as an absolute necessity in many instances (R. 244, 268, 294, 304). The proposed service to be offered by the railroad through the utilization of The Willett Company of Indiana in so-called substituted truck service for rail peddler-car service had been explained to them, and they appeared at the hearing in support of the application. It was their understanding that the service rendered to them, both on inbound and outbound shipments, would be expedited to the extent of twenty-four to forty-eight hours.

and in some instances they would receive a daily service instead of a tri-weekly service (R. 266, 274, 276, 294, 304).

The testimony of these witnesses also showed that rail transportation is preferable to the shipper because the shipper there deals with a single dependable transportation agency, viz., the railroad, which is responsible for shipments for the entire journey (R. 254-55). Another reason for shipper preference of rail transportation lay in the fact that a great many shipments, particularly to or from small points, were relatively small in volume per shipment, and also irregular in frequency of shipment. Truck lines naturally do not desire this type of traffic, but rather prefer truck-load shipments, or at least regular daily shipments, and between major points (R. 483, 495, 642, 656, 662). On the other hand, under the proposed operation the railroad would afford regular daily service on an expedited basis, regardless of the amount of the individual shipment or the frequency of the individual shipment (R. 250-52).

Following the testimony of the four witnesses above referred to, a stipulation was entered into by agreement of parties as follows (R. 309):

> "It is stipulated and agreed by and between the applicant and protestants herein, by their respective counsel, that there are present in the hearing room at this time, for the purpose of testifying on behalf of the applicant, certain witnesses, which witnesses have been duly sworn, and, if called to the witness stand, would testify substantially as hereinafter set forth in the written stipulations, copies of which are filed herein. It is hereby further stipulated and agreed that the written statements of proposed testimony of each of said applicant's witnesses for whom a written statement of testimony is submitted and made a part of the record herein, may be treated and considered as the testimony of each such witness as though the same had been presented by formal testi-

mony in question and answer form, and that the answers given on cross-examination by each such witness would generally and substantially be the same as the answers previously given by all of the applicant's shipper witnesses to questions propounded to them by protestants' attorneys this day. It is further stipulated and agreed that that portion of the testimony of the witness, Edward F. Dinkel, insofar as his testimony pertained to his service in performing pick-up and delivery service at Conklin, Michigan, for The Pennsylvania Railroad Company, shall not apply to the balance of the testimony of the applicant's shipper witnesses. Said written stipulations, pertaining to the witnesses hereinafter enumerated, are as follows:"

Each and every one of the thirty-eight stipulations embodied in the record contains in substance the following for each witness whose testimony was stipulated (R. 309-46):

1. That he is acquainted with the inbound and outbound shipments which his company ships.
2. That his business does now and has for years used the services of The Pennsylvania Railroad Company over one of the routes described in the application (in each instance naming the number of years and specifically stating the exact route).
3. That the same outbound and inbound shipments which his company ships and receives over The Pennsylvania Railroad to and from the city in which his business is located, are as follows: (In each instance there was named the approximate number of shipments, the weight of each, and the origin or destination points as the case might be; in total, amounting to millions of pounds of freight, constituting commodities generally, in interstate commerce).

4. The witness has had explained to him the service to be rendered in the rail-truck service by The Willett Company of Indiana, Inc., for The Pennsylvania Railroad Company, over this route, serving his business.

5. He has also had explained to him that this rail-truck service serving his business, if instituted, will expedite the movement of the shipments to and from his business by The Pennsylvania Company 24 hours or more.

6. If such service is authorized by the Interstate Commerce Commission, it will serve the convenience and necessity of his business and his business will continue to use The Pennsylvania Railroad service in conjunction with the rail-truck service described in the application.

It was also stipulated that under cross-examination these witnesses would respond in general in the same manner as did the four witnesses who actually testified, with respect to their particular business and particular localities (R. 309).

Samples of cross-examination were included in the record substantially as follows:

> We (the shippers) don't use many of the truck lines. Present service of The Pennsylvania Railroad and the various truck lines that are serving us are adequate unless they could improve on the service in some way of other, of course (R. 246-47).

> The truck service we receive is, in some instances slower than rail; it takes one day less by rail, in some instances. In some of these instances, we have suggested to the shipper to change the truck routing; some of the truck lines serve in one direction only (R. 250-252).

The only complaint against The Pennsylvania Railroad from certain points is that of damage; it is no fault of The Pennsylvania Railroad (R. 245, 253). Some of the truck lines serving us are good and we have no complaint to make against that service (R. 246-247).

Regarding damage claims when shipments are handled directly by the railroads all the way through, and you have to have a damage claim, you will be much more apt to get a quicker return from handling your damage claim with one Claim Department than you will if you have to go through two or three trucking companies with it (R. 254-55).

Some of the truck lines serving our town have no regular schedule (R. 268).

We are satisfied with our truck service by short haul (R. 269-270).

We are not using the service of common motor carriers on long hauls, except when it is routed that way, but we prefer to ship long haul by rail if we can get it that way (R. 269-70).

As far as our interest is concerned in this proposed service, it is that we need a 24-hour speeding up of the service. If they speed up the service to us as far as the movement of any particular shipment is concerned, that is what we request. We are interested in seeing the railroads speed up this service (R. 276).

In opposition to the foregoing testimony introduced in support of the application, the protesting motor carriers presented evidence through their own witnesses, and by cross-examination of the applicant's witnesses, designed to show: (1) that shippers at points to be served by the proposed substituted service were reason-

ably well satisfied with, and had no substantial complaint against, the present rail service rendered through peddler or local way-freight cars; and (2) that one or more existing independent motor carrier operators were already providing motor carrier service to most of the points intended to be served by the proposed substituted service. However, as already pointed out (p. 9 above), the testimony showed that none of the existing independent motor operators served all the routes sought in the application. One of the protesting independents, the Inter-State Motor Freight System, was engaged in performing substituted service of the type proposed for a rail competitor of the Pennsylvania, the Pere Marquette Railroad (R. 643-50).

Certain shipper witnesses presented on behalf of the protestants testified that they found the existing motor service attractive. Some testified that they preferred it to the local rail way freight service because it was quicker. Practically all, however, testified on cross-examination by applicant's counsel that if the rail service could be expedited as claimed by the applicant, this would be of value and benefit to their business (R. 477, 485, 488, 496-97, 515, 528, 533, 535, 542, 551).

The Commission, after fully and thoroughly reviewing the evidence in its report (R. 6-12), reached the following conclusions on the relevant issues between the parties:

> 1. "The railroad, through its subsidiary, merely seeks the substitution of a more efficient for a less efficient means of service." (R. 11.)
>
> 2. "The motor carrier service proposed by applicant, operated in close coordination with the railroad's service, will effectuate a reduction in cost, and will result in an increase in efficiency in the transportation over the routes herein considered, which will inure to the benefit of the general public.

Furthermore, it does not appear that the restricted service would be directly competitive or unduly prejudicial to the operations of any other motor carrier." (R. 11.)

3. "While several motor carriers operate over portions of the routes involved and in some cases perform similar station-to-station service for the Pere Marquette Railroad, it must be borne in mind that the railroad [*i. e.*, The Pennsylvania Railroad] has been and is transporting the traffic in question between its stations and is under an obligation to continue to do so. Applicant's service will be of a different character from that performed by motor carriers generally. It will be limited to the handling of merchandise traffic to and from points on the lines of the railroad in substitution for train service. To utilize the facilities of protestant motor carriers, the railroad would be required to make arrangements with several of them, each performing a more or less disjointed part of the service." (R. 10-11.)

Accordingly, the Commission found that "the present and future public convenience and necessity require operation by applicant as a common carrier by motor vehicle" in the manner proposed in the application and subject to the restrictions and conditions set forth above, for the purpose of providing substituted motor service for the handling of less-than-carload traffic in local way-freight service to and from stations on the rail line of The Pennsylvania Railroad Company (R. 12). The authority to engage in the operation in question was therefore granted, and protestants' later petition for reconsideration was denied (R. 916).

The Commission's order having been made and entered, one of the protesting carriers in the proceeding before the Commission, Harry A. Parker, doing business as "Parker Motor Freight," on February 21, 1944, instituted this suit by filing his bill of complaint in the District

Court for the Southern District of Indiana (R. 1-6), wherein it was alleged that the order of the Commission was "based on improper and unlawful conclusions of both fact and law," and upon findings having no foundation in the record, and praying among other things that the court adjudge the said order to be null and void, and that it enjoin, set aside, annul and suspend the same. (R. 5).

A specially constituted three-judge court having been duly convened under the provisions of the Urgent Deficiencies Act to hear the cause (R. 15), motions for leave to intervene in support of the complaint were filed by certain trucking companies and associations of trucking companies, viz., Norwalk Truck Line Company, Regular Common Carrier Conference of The American Trucking Associations, Inc., Motor Carriers Central Freight Association, Consolidated Freight Company, and Creston Transfer Company. These motions were granted (R. 16-17, 28, 32). On April 21, 1944, the United States of America filed its answer to the complaint, asking that the relief prayed for be denied (R. 20). The Interstate Commerce Commission (R. 19), The Pennsylvania Railroad Company (R. 22), and The Willett Company of Indiana, Inc. (R. 27) intervened in opposition to the complaint and filed answers.

The statutory court heard the case on the record as made before the Commission, and on June 30, 1944, made an order, accompanied by findings of fact and conclusions of law but without opinion, setting the Commission's order aside (R. 44-46). On August 22, 1944, the Interstate Commerce Commission, The Willett Company of Indiana, Inc., and The Pennsylvania Railroad Company prayed for an appeal to this Court (R. 46-47), and the appeal was allowed on the same day (R. 49). On August 25, 1944, the United States likewise prayed for an appeal (R. 53), and the appeal was allowed (R. 54). On November 6, 1944, this Court noted probable jurisdiction (R. 918).

QUESTIONS PRESENTED.

1. Whether or not the Interstate Commerce Commission's established policy, developed over a period of years and repeatedly applied, of granting to a motor carrier subsidiary of a railroad limited permission to operate in substituted service for the railroad on a showing that improved service to shippers and increased operating economy and efficiency will result, is authorized by the provisions of the Interstate Commerce Act and the declaration therein that the policy of Congress is to promote economical and efficient transportation service to the end of developing, coordinating and preserving an adequate national transportation system?

2. Whether or not the Interstate Commerce Act requires, as a prerequisite to permission to operate in such substituted service, that proof be made that the facilities of existing independent motor carriers are physically inadequate to handle the freight in question?

3. Whether or not there is sufficient foundation in the law and the facts to support the Commission's exercise of administrative discretion in this case, as manifested in its findings and order, whereby it granted limited permission to a motor carrier subsidiary of a railroad to engage in substituted service for the railroad, in accordance with the established policy of the Commission?

SUMMARY OF ARGUMENT.

The Interstate Commerce Commission has evolved, over a period of years, a policy of permitting railroads to expedite and improve their service to shippers and increase the economy and efficiency of their operations by

substituting motor vehicle for rail handling in the service of transporting less-than-carload movements of package freight to and from local way-stations on the railroads' lines—a service the railroads are obliged to render—and thus coordinating and supplementing the railroads' all rail service with such use of motor vehicles. At the same time the Commission, in developing this policy, has taken steps to insure protection of the general over-the-road service of independent motor carriers against railroad competition in that field. This established policy of the Commission is embodied in its present practice of granting to a railroad, or its wholly owned motor carrier subsidiary, limited permission to engage in such substituted motor vehicle service for the railroad, subject to certain conditions and restrictions.

In developing this policy of permitting railroads to use, either directly or through motor carrier subsidiaries, motor vehicles in supplement of and coordination with their own service, for the benefit of the public and the improvement of railroad operations, the Commission has had before it the declaration in the Interstate Commerce Act that it is the policy of Congress to "promote * * * economical and efficient service and foster sound economic conditions in transportation and among the several carriers * * * all to the end of developing, coordinating and preserving a national transportation system by * * * highway and rail, as well as other means." The Commission has also had before it the provisions in the Interstate Commerce Act under which a railroad may acquire ownership and control of a motor carrier where the Commission finds that such acquisition will enable the railroad "to use service by motor vehicle to public advantage in its operations and will not unduly restrain competition."

Exercising the administrative discretion which this Court has held to be vested in the Commission to carry out the provisions and policy of the Interstate Commerce

Act, the Commission has been guided by this declared Congressional policy and these statutory provisions in its interpretation of the statutory standard applicable where authority to engage in motor vehicle operations is sought, viz., public convenience and necessity, and has accordingly found that public convenience and necessity warrant the granting of permission to a railroad or its motor carrier subsidiary to engage in substituted service operations, under appropriate circumstances.

In order to insure that such proposed substituted service by a railroad or its motor carrier subsidiary will "promote economical and efficient service" and will aid in the development and coordination of the various means of transportation into an improved transportation system, the Commission has in such cases required a showing, first, that the proposed substitution of motor vehicle for rail handling will result in improved and more economical and efficient service, and second, that the proposed substituted service and the anticipated improvement in the railroad's service resulting therefrom cannot be satisfactorily supplied by existing independent motor carriers. At the same time, in order to insure that the railroad will not use its or its subsidiary's motor vehicles to engage in competition with the general over-the-road service of existing independent motor carriers, the Commission has in such cases attached conditions designed to limit the proposed substituted service to service which will be auxiliary and supplemental to the railroad's service and to prevent the railroad or its motor carrier subsidiary from engaging in general over-the-road truck operations.

The present case grows out of an application by a motor carrier subsidiary of a railroad to engage in substituted service for the railroad. The Commission's findings, supported by evidence, establish that the requisite showing of improvement in service and inadequacy of existing motor carriers has been made in the present case, and therefore the case falls squarely within the policy

established by the Commission for handling such cases. Since the evidence and the findings show that the Commission's action in granting the authority sought, subject to the usual conditions, will result in improvement of the railroad's service, from the standpoint of the shipping public, and in increased economy and efficiency of the railroad's operations, this action by the Commission is clearly in accord with the applicable provisions of the Act and in furtherance of the Congressional policy declared therein. That policy contemplates, and the Commission's action in this case will promote, the development of an improved and better coordinated transportation system and will encourage healthy competition. On the other hand, the opposing position of the appellees—protesting independent motor carriers—which was accepted by the court below, would result in the hindering of progress in the transportation field and the stifling rather than the encouraging of healthy competition, with the result that the declared Congressional policy would be defeated.

ARGUMENT

I.

THE LAW.

The Established Policy of the Interstate Commerce Commission, to Permit Railroads, under Appropriate Circumstances, to Substitute Motor for Rail Movement of Local Less-than-Carload Freight and to Employ for this Purpose Motor Carriers Controlled by Them, is in Accord with and in Furtherance of the Provisions and Declared Policy of the Interstate Commerce Act, Because it Makes Possible the Coordination of Rail and Motor Service to Public Advantage and Provides an Improved Service Not Otherwise Attainable.

This proceeding is an attack, successful in the court below, on a policy which the Interstate Commerce Com-

mission, acting under the broad powers vested in it by the Interstate Commerce Act, has developed and adopted over a period of years, for the purpose of granting a limited opportunity to railroads to improve their service to shippers and increase the efficiency and economy of their operations by supplementing those operations with the use of motor vehicles.

It is the declared policy of Congress to promote economical and efficient transportation, and to develop, coordinate and preserve a national transportation system by highway and rail, as well as by other means. In furtherance of this policy, Congress has empowered the Commission to issue operating authority to motor carriers, under circumstances found by the Commission to be appropriate, and has also empowered the Commission to permit a railroad to acquire ownership of or an interest in a motor carrier where consistent with the public interest, and where the railroad will thereby be enabled to use motor vehicle service to public advantage in its operations.

In recent years there has developed a new method of transportation service, wherein motor carrier operations are used in coordination with rail operations, by the substitution of motor vehicle hauls for local short-distance rail movements of less-than-carload freight. The transportation of less-than-carload freight to, from and between local way-stations on a railroad's line is of course a service which the railroad is obligated to render. The method employed by railroads in the past in rendering this service has been that of so-called "peddler cars" in freight trains, into and out of which cars less-than-carload packages (barrels, boxes, cases and the like) are loaded and unloaded at the platforms of the several freight stations along the line. In territory where the traffic volume is thin, these peddler cars are of necessity lightly loaded, which results in wasteful expense in the hauling of un-

filled cars, and also causes serious delays in the movement of the trains in which these cars are hauled, because of the frequent stops required for loading and unloading. This method of handling local less-than-carload freight in peddler cars thus involves a substantial waste in the use of cars and motive power, and in the time of train crews, as well as in the large amount of transfers and switching operations required. It likewise results in inevitable delay and tardiness in delivery to shippers, since there is not enough freight of this description to permit frequent dispatch of the "peddler cars." It has been found that the use of motor vehicles for the transportation of less-than-carload freight to such local way-stations, in substitution for the "peddler" car service, results in better and faster service to the shipper and in greater economy and efficiency of operation from the standpoint of the carrier.

The Interstate Commerce Commission, aware of the improved service and increased economy and efficiency of operation resulting from the use of motor vehicles in coordination with rail operation in the foregoing manner, and in furtherance of the declared national transportation policy to promote economical and efficient service and develop and coordinate a national transportation system by highway and rail, has permitted such coordinated operations, subject to certain restrictions which are imposed for the purpose of preserving a proper relationship between rail and motor vehicle operations, while permitting the desired coordination. In a series of cases extending over a number of years, the Commission has worked out a limited type of operating certificate, which it has granted, on a proper showing, to railroads or their motor carrier subsidiaries, in order to permit the operation of motor vehicles in substitution for the movement of less-than-carload freight in local way-freight trains.

A. UNDER THE DECLARED POLICY AND PROVISIONS OF THE INTERSTATE COMMERCE ACT, THE COMMISSION IS VESTED WITH BROAD AUTHORITY TO FOSTER COORDINATION OF MOTOR AND RAIL TRANSPORTATION FOR THE PURPOSE OF IMPROVING SERVICE, PROMOTING ECONOMY AND EFFICIENCY OF OPERATION, AND DEVELOPING AN ADEQUATE NATIONAL TRANSPORTATION SYSTEM, TO THE PUBLIC ADVANTAGE.

That Congress intended to permit, and indeed to encourage, the coordination of motor with rail transportation, appears plainly from the declaration of policy with which it prefixed the Motor Carrier Act of 1935. That declaration of policy provided in part (49 Stat. 543; see Appendix hereto, p. 1a):

> "It is hereby declared to be the policy of Congress to regulate transportation by motor carriers in such manner as to * * * *improve the relations between, and coordinate transportation by and regulation of, motor carriers and other carriers.*" (Emphasis supplied.)

By the Transportation Act of 1940, this declaration of policy was consolidated, with other declarations of policy from other parts of the Interstate Commerce Act, into one general declaration of a national transportation policy (Transportation Act of 1940, Secs. 1, 17 (a); 54 Stat. 899). In this general declaration of the national transportation policy are included the following provisions (54 Stat. 899; see Appendix hereto, pp. 5a-6a):

> "It is hereby declared to be the national transportation policy of the Congress to provide for fair and impartial regulation of all modes of transportation subject to the provisions of this Act, so administered as to recognize and preserve the inherent advantages of each; to promote safe, adequate, *economical and efficient service and foster sound eco-*

*nomic conditions in transportation and among the several carriers * * * all to the end of developing, coordinating, and preserving a national transportation system by water, highway, and rail*, as well as other means, adequate to meet the needs of the commerce of the United States, of the Postal service, and of the National defense. *All of the provisions of this Act shall be administered and enforced with a view to carrying out the above declaration of policy.*" (Emphasis supplied.)

Further manifestation of the Congressional intent to foster and encourage coordination of rail and motor vehicle methods of transportation was contained in Sec. 213 (a) of the Interstate Commerce Act. As originally enacted in the Motor Carrier Act of 1935, this section provided in part (49 Stat. 555; see Appendix hereto, pp. 4a-5a):

"*It shall be lawful*, under the conditions specified below * * * *for a carrier by railroad* * * * *to* * * * *acquire control of, any motor carrier*, or to purchase, lease or contract to operate its properties, or any part thereof. * * * (1) * * * If * * * the Commission finds that the transaction proposed will be consistent with the public interest and that the conditions of this section have been or will be fulfilled, it may enter an order approving and authorizing such consolidation, merger, purchase, lease, operating contract or acquisition of control. * * * *Provided, however*, That *if a carrier other than a motor carrier is an applicant* * * * * the Commission shall not enter such an order unless it finds that the *transaction proposed will promote the public interest by enabling such carrier other than a motor carrier to use service by motor vehicle to public advantage in its operations and will not unduly restrain competition.*" (Emphasis supplied.)

In the Transportation Act of 1940, these provisions were combined with other consolidation and acquisition provisions of the Act and rewritten into a new Section 5, which provides generally for the acquisition of one carrier by another under certain conditions, upon Commission approval, where the proposed acquisition is found by the Commission to be consistent with the public interest. The proviso clause last quoted above from the original Section 213, was carried over into the new Section 5 in the following form (54 Stat. 906; see Appendix hereto, pp. 7a-8a):

> "*Provided*, that if a carrier by railroad subject to this part * * * is an applicant in the case of any such proposed transaction involving a motor carrier, the Commission shall not enter such an order unless it finds that the transaction proposed will be consistent with the public interest *and will enable such carrier to use service by motor vehicle to public advantage in its operations and will not unduly restrain competition.*" (Emphasis supplied.)

The plain implication to be derived from all these provisions when read together is that a rail carrier may be permitted, either directly or through a motor carrier acquired by it, to supply service by motor vehicle in coordination with its own service where it is found by the Commission that such supplying of motor vehicle service will be "to the public advantage" *in the operations of the rail carrier*, and will not unduly restrain competition. Where the Commission so finds, it is the Congressional intent that the Commission may permit coordination of the rail and motor vehicle services, even to the extent of allowing the rail carrier to acquire complete control of a motor carrier for the purpose of using the latter in conjunction with its rail operations.

That the cordination of motor with rail transportation, by a railroad's use of motor service where advantageous,

results will ensue, was one of the specific Congressional objectives in the enactment of the Motor Carrier Act, appears plainly from the legislative history of that Act. The Interstate Commerce Commission, having conducted an extensive investigation upon the subject of "Coördination of Motor Transportation",* had the following to say, in its annual report to Congress for 1932 (House Doc. No. 430, 72nd Congress, 2nd Session, pp. 21-22):

> "In our judgment there is great opportunity for the advantageous use of motor trucks and busses to supplement or in substitution for railroad service, and we welcome the numerous experiments which are being made in this direction. * * * We found that transportation by motor vehicles, busses, and trucks, over the public highways is, within certain distances, and in certain respects, a superior service, *and that the rail and water lines should be encouraged in the use of this instrumentality of commerce wherever such use will promote more efficient operation or improve the public service.*" (Emphasis supplied.)

In testifying before the House sub-committee on the bill which ultimately became the Motor Carrier Act, Commissioner Eastman made the following statement (Hearings on H. R. 5262 and H. R. 6016, 74th Congress, 1st Session, February-March, 1935, p. 46):

> "I hope and expect to see the railroads utilize these motor vehicles in their own operations to a much greater extent than they now do. They are doing it to a considerable extent; they operate some; they have abandoned branch lines and they are operating busses instead of trains in some cases. They are utilizing motor vehicles in their terminal operations and *they have used them as a substitute for way freight service, in some cases. My own view is*

* The Commission's formal report with respect to this investigation appears in *Coordination of Motor Transportation*, 182 I. C. C. 263 (1932).

that there will be found many more ways where they can be used to advantage in combination with railroad service and I hope to see the time when the railroads will utilize these opportunities fully." (Emphasis supplied.)

With respect to the comparable bill in the Senate, Commissioner Eastman testified as follows (Hearings on S. 1629, S. 1632 and S. 1635, 74th Congress, 1st Session, February-March, 1935, p. 85):

"My own personal opinion is that the railroads are going more and more to find that they can use trucks and busses to advantage in connection with their own service—*supplement it and substitute for it where they can do the job better than the rails can do it.*" (Emphasis supplied.)

Again, in the 1938 hearings on the bill proposing amendments to the Motor Carrier Act, Commissioner Eastman, in discussing the significance of the provisions of Sec. 213 (a), quoted above, said (Hearings on H. R. 9739, 75th Congress, 3rd Session, May, 1938, p. 34):

"*Without any question there are certain things that the trucks can do to advantage in connection with rail operations.* The railroads which have gone into the trucking business are more and more using trucks in place of their local way freight trains. In other words, *instead of distributing the station-station business, in the case of the smaller stations, by these local trains, they do it by truck instead and can do it more expeditiously and more cheaply.* I have heard some railroad men say that the day of the way freight train is passing, and soon there will be none; that all of that business will be done by trucks." (Emphasis supplied.)

Similar expressions of Commissioner Eastman's views on this subject appear in the reports which he made in his capacity as Federal Coordinator of Transportation in 1934 and 1935.*

These statements by Commissioner Eastman leave no doubt that, in his judgment, the use by railroads of motor vehicles in conjunction with their rail operations, and particularly in substitution for local trains in way-freight service, was decidedly to the public advantage and should be permitted under the Motor Carrier Act. With these statements before it, and in the light of the provisions and policy declarations of the Act, Congress must certainly have intended, in enacting the Act, that the results which Commissioner Eastman thus described as desirable and to the public advantage should be permissible under the Act.†

Under the provisions of the Act, the determination of whether or not, and under what conditions, a proposed coordinated motor vehicle-rail operation shall be permitted is, of course, left to the discretion of the Commission. In construing the Motor Carrier Act and the declared policy of Congress with respect to motor carrier transportation

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*See Second Report of Federal Coordinator of Transportation, Sen. Doc. No. 152, 73rd Congress, 2nd Session, pp. 18-19, and Third Report of Federal Coordinator of Transportation, House Doc. No. 89, 74th Congress, 1st Session, pp. 6, 117.

†Both the Senate and House Reports on the bills which became the Motor Carrier Act of 1935 referred not only to the evidence presented at the Congressional hearings but also to the reports of the Federal Coordinator and the annual reports of the Commission and its investigation on this subject, as constituting the principal sources of information relied on by the Senate and House Committees in recommending enactment of the Motor Carrier Act (Senate Report No. 482, 74th Congress, 1st Session, pp. 2-3; House Report No. 1645, 74th Congress, 1st Session, pp. 2-5). The Senate Report includes the following significant language (p. 3):

> "The ultimate objective of the entire program is a system of coordinated transportation for the Nation which will supply the most efficient means of transport and furnish service as cheaply as is consistent with fair treatment of labor and with earnings which will support adequate credit and the ability to expand as need develops and to take advantage of all improvements in the art."

and transportation in general, this Court has found, in the broad declaration of policy and the broad powers vested under the Act in the Interstate Commerce Commission, an intent on the part of Congress to allow to the Commission a wide measure of administrative discretion in carrying out the declared Congressional policy, to be exercised in the light of the Commission's expert knowledge and informed experience. As recently as *McLean Trucking Co.* v. *U. S.*, 321 U. S. 67 (1944), this Court, in holding that the Commission's approval of a motor carrier consolidation was not struck down by the anti-trust laws, has discussed at length the implications of the Congressional declaration of transportation policy, and has said, speaking through Mr. Justice Rutledge (pages 80-88):

> "The national transportation policy is the product of a long history of trial and error by Congress in attempting to regulate the nation's transportation facilities beginning with the Interstate Commerce Act of 1887. For present purposes it is not necessary to trace the history of those attempts in detail other than to note that the Transportation Act of 1920 marked a sharp change in the policies and objectives embodied in those efforts. 'Theretofore, the effort of Congress had been directed mainly to the prevention of abuses; particularly those arising from excessive or discriminatory rates'; and emphasis on the preservation of free competition among carriers was part of that effort. The Act of 1920 added 'a new and important object to previous interstate commerce legislation.' *It sought affirmatively to build up a system of railways prepared to handle promptly all the interstate traffic of the country.' Dayton-Goose Creek R. Co.* v. *United States*, 263 U. S. 456; *Texas & P. R. Co.* v. *Gulf C. & S. F. R. Co.*, 270 U. S. 266, 277. And in administering it, *the Commission was to*

*be guided primarily by consideration for 'adequacy of transportation service, * * * its essential conditions of economy and efficiency, and * * * appropriate provision and best use of transportation facilities * * *.' New York Central Securities Corp.* v. *United States,* 287 U. S. 12, 25.

Since that initial effort at reshaping regulation of railroads to 'insure * * * adequate transportation service,' Congress has extended federal regulation in connection with other forms of transportation and has elaborated more fully the objectives to be achieved by its legislation. In 1935 it enacted a comprehensive scheme of regulation for motor carriers, designed to result in *'a system of coordinated transportation for the Nation which will supply the most efficient means of transport* and furnish service as cheaply as is consistent with fair treatment of labor and with earnings which will support adequate credit and the ability to expand as need develops and *to take advantage of all improvements in the art.'* The policy which was to guide the Commission in administering that Act was fully stated and has since been absorbed into the equally full statement of the National Transportation Policy. *That policy, which is the Commission's guide to 'the public interest,'* cf. *New York Central Securities Corp.* v. *United States,* 287 U. S. 12; *State of Texas* v. *United States,* 292 U. S. 522, *demands that all modes of transportation* subject to the provisions of the Interstate Commerce Act *be so regulated as to 'recognize and preserve the inherent advantages of each; to promote* safe, adequate, *economical, and efficient service and foster sound economic conditions in transportation and among the several carriers;* to encourage the establishment and maintenance of reasonable charges for transportation services, without unjust discriminations, undue preferences or advantages, or

unfair or destructive competitive practices; . . . all to the end of *developing, coordinating, and preserving a national transportation system by water, highway, and rail,* as well as other means, adequate to meet the needs of the commerce of the United States, of the Postal Service, and of the national defense.' 54 Stat. 899, 49 U. S. C. A. note preceding section 1."

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"In short, the Commission must estimate the scope and appraise the effects of the curtailment of competition which will result from the proposed consolidation and consider them along with the advantages of improved service, safer operation, lower costs, etc., to determine whether the consolidation will assist in effectuating the over-all transportation policy. *Resolving these considerations is a complex task which requires extensive facilities, expert judgment and considerable knowledge of the transportation industry. Congress left that task to the Commission 'to the end that the wisdom and experience of that Commission may be used not only in connection with this form of transportation, but in its coordination of all other forms.'* 79 Cong. Rec. 12207. 'The wisdom and experience of that commission,' not of the courts, must determine whether the proposed consolidation is 'consistent with the public interest.' Cf. *Interstate Commerce Commission* v. *Illinois Central R. Co.*, 215 U. S. 452; *Pennsylvania Co.* v. *United States*, 236 U. S. 351; *United States* v. *Chicago Heights Trucking Co.*, 310 U. S. 344; *Purcell* v. *United States*, 315 U. S. 381. If the Commission did not exceed the statutory limits within which Congress confined its discretion and its findings are adequate and supported by evidence, it is not our function to upset its order." (Emphasis supplied.)

The point has also been well stated by Mr. Justice Jackson, speaking for this Court, in his discussion, in *I. C. C. v. Inland Waterways Corp.*, 319 U. S. 671 (1943), of the general policy provisions of the Interstate Commerce Act, which in their present form were incorporated therein by the Transportation Act of 1940 (p. 691 of 319 U. S.):

> "The policy provisions of the Transportation Act of 1940, as well as the specific statutory provisions, provide only standards of considerable generality and some overlapping. *It requires administration to recognize and preserve the inherent advantages of each—rail, water, and motor transportation.* * * * *Nor are we at liberty to prescribe general attitudes the Commission must adopt towards the exercise of discretion left to it rather than to courts.* We decide only whether the Commission has acted within the power delegated to it by law." (Emphasis supplied.)

The specific exercise of administrative discretion which the Commission is called upon to make, in a case like that at bar, where authority is sought by a railroad or a motor carrier subsidiary of a railroad, to substitute motor vehicle for rail movement of less-than-carload freight in local way-freight service, is the determination of whether or not a certificate permitting such substituted motor vehicle operation should be granted under Sections 206 and 207 of the Act (49 Stat. 554; see Appendix hereto, pp. 1a-4a). Those sections make it necessary for a common carrier by motor vehicle to have a "certificate of public convenience and necessity" from the Commission before it can engage in highway operations (subject to certain exceptions not relevant here), and they provide that such a certificate shall be issued by the Commission "if it is found [by the Commission] that the applicant is fit, willing and able properly to perform the service proposed, and to conform to the provisions of this part, and the requirements, rules and

regulations of the Commission thereunder, and that the proposed service, to the extent to be authorized by the certificate, is or will be required by the present or future public convenience and necessity". (49 Stat. 551). The statutory standard thus specified for the Commission's guidance is that of "public convenience and necessity."

The phrase "public convenience and necessity" was not new in the Interstate Commerce Act at the time of the addition thereto of the Motor Carrier Act of 1935. The same phrase had been used to designate the standard by which the Commission should be guided in passing upon applications for permission to extend or abandon an existing railroad line or construct a new one, under paragraphs (18), (19) and (20) of Section 1 of the Act.* This Court has made it plain that, in applying this statutory standard, the Commission's discretion is to be guided by the purpose and policy of the Act. Thus in *Ches. & Ohio Ry. Co.* v. *United States*, 283 U. S. 35 (1931), this Court, in sustaining the Commission's action with respect to certain applications under paragraphs (18) to (20) of Sec. 1, said (page 42):

> "There is no specification of the considerations by which the Commission is to be governed in determining whether the public convenience and necessity require the proposed construction. Under the Act it was the duty of the Commission to find the facts and, in the exercise of a reasonable judgment, to determine that question. *Texas & Pac. Ry. Co.* v. *Gulf, etc. Ry. Co.*, 270 U. S. 266, 273."

Recent decisions of this Court have made it plain that the determination of the precise scope of the standard of public convenience and necessity set up in the Motor Carrier Act is a matter primarily for the Commission, in the exercise of its administrative judgment: *Alton R.*

*These paragraphs establishing the requirement of "public convenience and necessity" for extensions and abandonments were added to the Interstate Commerce Act by the Transportation Act of 1920 (41 Stat. 476).

Co. v. *U. S.*, 315 U. S. 15, 23-24 (1942); *Noble* v. *U. S.*, 319 U. S. 88, 92-93 (1943).*

And in *I. C. C.* v. *Railway Labor Assn.*, 315 U. S. 373 (1942), this Court said (page 376):

> "*The phrase 'public convenience and necessity' no less than the phrase 'public interest' must be given a scope consistent with the broad purpose of the Transportation Act of 1920*, 49 U. S. C. A. §71; *et seq.*: to provide the public with an efficient, and nationally integrated railroad system." (Emphasis supplied.)

Thus, in its use of the phrase "public convenience and necessity" in the Act, Congress obviously intended that the standard of convenience and necessity to be applied by the Commission should embrace measures which tend to promote economical and efficient transportation service and the development and coordination of an adequate national transportation system, and which therefore further the transportation policy declared by Congress.

B. THE COMMISSION'S POLICY OF PERMITTING RAILROADS, UNDER APPROPRIATE CIRCUMSTANCES, TO SUBSTITUTE MOTOR FOR RAIL MOVEMENT OF LOCAL LESS-THAN-CARLOAD FREIGHT, AND TO EMPLOY FOR THIS PURPOSE MOTOR CARRIERS OWNED BY THEM, SUBJECT TO CONDITIONS DESIGNED TO PREVENT UNDUE RESTRAINT OF COMPETITION, HAS BEEN EVOLVED BY THE COMMISSION AFTER CAREFUL CONSIDERATION OVER A PERIOD OF YEARS, AND IS IN ACCORD WITH THE PROVISIONS OF THE ACT AND THE TRANSPORTATION POLICY DECLARED THEREIN BY CONGRESS IN THAT IT IMPROVES SERVICE AND PROMOTES ECONOMY AND EFFICIENCY OF OPERATION, TO THE PUBLIC ADVANTAGE.

Applying the statutory guides referred to above, the Commission has over a period of years evolved a policy of

* Similarly, this Court has held that the determination of the precise scope of other standards established in the Interstate Commerce Act, such as those of discrimination and preference, and the extent of the term transportation, is a matter primarily for the informed administrative judgment of the Commission. *United States* v. *Chicago Heights Trucking Co.*, 310 U. S. 344, 352-53 (1940); *J. T. Barringer* v. *U. S.*, 319 U. S. 177-8 (1943); *Swift & Co.* v. *U. S.*, 316 U. S. 246, 230-31 (1942).

permitting a railroad, either directly or through its motor carrier subsidiary, to substitute motor vehicle carriage for rail carriage in the transportation of less-than-carload freight to, from and between local way-stations on the line of the railroad, under appropriate circumstances and subject to certain specified conditions. This policy was found by the Commission to be in accordance with the declared transportation policy of Congress and to be warranted by "public convenience and necessity," because it resulted in improved service to the shipper and in increased economy and efficiency in the railroad's operations, and therefore was in furtherance of the Congressional policy to "promote * * * economical and efficient service and foster sound economic conditions in transportation and among the several carriers * * * all to the end of developing, coordinating and preserving a national transportation system by * * * highway and rail as well as by other means" (see pp. 24-25 above).

1. *The Commission's Early Recognition of the Practical Advantages of Railroad-Controlled Substituted Service, in the Resultant Operating Economies and Expedited Service, and Also of the Need to Protect Independent Motor Carriers Against General Over-the-Road Competition from Railroad-Controlled Motor Carriers.*

Even prior to the enactment of the Motor Carrier Act of 1935, the Commission began to recognize the practical advantages of motor vehicle service by the railroads as a substitute for peddler-car, way-freight operations by rail. In its comprehensive report in 1932 on the subject of *Coordination of Motor Transportation*, 182 I. C. C. 263, the Commission said (page 336):

> "(a) *Substitution of Trucks for way-trains and terminal switching.*—*It is generally recognized that peddler or way-freight operations, as to many points, consume much more time than do trucking movements*

and that they are costly because of the number of transfers required and the light loading of cars. In many instances the roundabout character of railroad lines adds to the difficulty. With increased highway competition, these drawbacks have become more and more serious. *For several years, therefore, a number of railroads have been substituting truck for rail movements of less-than-carload traffic from designated transfer points,* including some points specifically set up for the purpose of concentrating freight by rail for truck delivery to outlying stations. In the reverse direction the trucks collect freight for concentration at such transfer points. The distances covered are commonly 15 to 20 miles in either direction from the concentrating point. Regular rail rates apply and store-door service is not furnished, but frequently the substitution of truck for rail movement is not shown in the tariff. *The time of way-freight trains, which commonly carry a crew of five or six men, is thereby considerably reduced or the length of runs increased, deliveries are frequently made one to two days earlier, a more flexible service is made available, and the number of lightly loaded cars is reduced.* By taking care of traffic requiring expedited movement, it is further possible in some cases to reduce train service on unimportant lines from a daily basis to a 2-day basis, and in other cases, by eliminating less-than-carload movements, through trains have been able to take over the carload movement of way trains, eliminating the latter. The requirements of carload traffic and the divergence of highways from the routes of rail lines render it impossible to abandon all local freight-train service." (Emphasis supplied.)

Soon after the enactment of the Motor Carrier Act, the Commission had occasion to consider the question of the desirability of such substituted service, in the light of

the declared policy and provisions of the Motor Carrier Act. In *Pennsylvania Truck Lines, Inc.—Control—Barker*, 1 M. C. C. 101 (1936), the Commission was called upon to determine whether or not one motor carrier should be permitted to acquire control of another, where it appeared from the applications that the ultimate control of both would rest in a railroad and that the operations of the motor carriers would be used at least partially in coordination with and supplemental to railroad operations. In permitting the acquisition, the Commission said (pp. 105-11):

> "It is represented that the acquisition and operation of the properties of the partnership by the new Company under control of the vendee, as proposed, will promote the public interest and be *to public advantage by permitting the establishment of a coordinated truck-and-rail service properly synchronized under a single management.* This dual form of transportation is expected to furnish a more expeditious and economical service.
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> . . . . . .
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> *"The proof is convincing that over some of the routes in question the railroad can use service by motor vehicle to public advantage in its operations. The motor vehicle can undoubtedly be used as a very valuable auxiliary or adjunct to railroad service, particularly less-than-carload service, and the many opportunities for such use here have been pointed out of record and are clear. Such coordination of rail and motor-vehicle operations should be encouraged. The result will be a new form of service which should prove of much public advantage.* Nor do we believe that the creation of this new form of service will 'unduly restrain competition.' On the contrary, it should have the opposite effect." (Emphasis supplied.)

The Commission thus found that the use by a railroad of motor vehicle operations in a manner auxiliary to and supplemental of the railroad's operations, as in the case of the substituted service proposed, was in furtherance of the policy of the Act and should be encouraged. At the same time, however, and in the same case, the Commission gave consideration to the possible effect on independent motor carriers of permitting railroads to offer a general motor carrier service identical with that offered by such independent motor carriers. On this point the Commission concluded that it would not be in furtherance of the policy of the Act to permit a railroad to offer motor carrier service beyond a type of service which would merely be auxiliary to and supplemental of the railroad's own operations, and therefore that the motor carrier subsidiary of the railroad should not be accorded authorization to engage in a general over-the-road service of the type performed by independent motor carriers. This view the Commission expressed in the following conclusion, in the *Barker* case (p. 112):

> "We are unable to find, therefore, that the employment by the railroad of the properties and rights of the partnership to provide over-highway truck service as proposed herein in competition with rail and motor carriers generally, including the railroad, will 'promote the public interest' by enabling the railroad to use service by motor vehicle to public advantage in its operations and will not unduly restrain competition'."

2. The Commission's Development of its Policy of Permitting, Upon a Proper Showing, Railroad-Controlled Substituted Service, Subject to Conditions Designed to Protect Independent Motor Carriers Against General Over-the-Road Competition from Railroad-Controlled Motor Carriers.

Following out the principles which it thus laid down in the *Barker* case, the Commission, when it was

first confronted with an application for a certificate to permit the use of motor vehicles in substitution for rail movement of less-than-carload freight in way-freight trains, adopted the following course: (*a*) it granted the certificate upon a showing, first, that the substituted service in question would serve a useful public purpose, as for example, by improving service to the shipper and increasing the economy and efficiency of the operation; and second, that the service in question could not be satisfactorily furnished under existing operating certificates of other motor carriers; and (*b*) it attached conditions designed to insure that the proposed motor service would be used only as auxiliary to and supplemental of the railroad's operations, and not in general competition with over-the-road transportation by rail and motor carriers.

This appears from the Commission's first decision in a case of that character. In *Kansas City S. Transport Co., Inc., Com. Car. Application,* 10 M. C. C. 221 (1938), the Commission, in passing upon the application of a wholly owned motor carrier subsidiary of a railroad for a certificate permitting it to operate in substituted service for the railroad, described the proposed service as follows (page 226):

> "Applicant proposes to conduct common-carrier operations by motor vehicle in the transportation of general commodities under a plan which, it alleges, will in all respects provide service is supplementary and auxiliary to and coordinated with the railway's service. *The general plan of the coordinated service is to transport less-than-carload traffic by rail between key or break-bulk stations and distribute it thence by truck to the smaller way stations.*" (Emphasis supplied.)

(a). *Requirement of a Showing that the Proposed Substituted Service Would Be to the Public Advantage.*

After reviewing the evidence and finding that the proposed substituted service would result in economies of operation and in improved service to shippers, the Commission concluded in the *Kansas City S. Transport Co.* case as follows (pages 234-235):

> "Applicant has referred us to a long line of cases decided under part I of the act, in which we held in substance that effecting economies and reduction in cost of transportation and increasing efficiency of transportation service of a particular railroad inure to the benefit of the general public and justify the issuance of a certificate of public convenience and necessity. Applicant cites *Texas* v. *United States*, 292 U. S. 522, wherein the court, after stating that it had found in previous cases that the Transportation Act, 1920, set up a new policy 'seeking to insure adequate transportation service,' said:
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> > * * * It is a primary aim of that policy to secure the avoidance of waste. That avoidance, as well as the maintenance of service, is viewed as a direct concern of the public.
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> Applicant also cites *New York Central S. Corp.* v. *United States*, 287 U. S. 12, wherein the court said:
>
> > The public interest is served by economy and efficiency in operation * * *. the term 'public interest' as thus used is not a concept without ascertainable criteria, but has direct relation to adequacy of transportation service, to its essential conditions of economy and efficiency, and to appropriate provision and best use of transportation facilities * * *.

> The railway is now furnishing a less-than-carload, or merchandise, freight service which is expensive and in many respects unsatisfactory and inefficient. *Through applicant, if the certificate sought be obtained, it proposes to use motor vehicles in coordination with its rail operations in such a way that a merchandise service can be provided that will be much less expensive and at the same time more expeditious and more convenient and generally satisfactory to the public served. That these results can be achieved the record leaves no doubt. Moreover, it is clear that this coordinated rail-motor service will be a new form of service, utilizing both forms of transportation to advantage, and differing from the service given by the railway alone or by competing motor carriers alone. That Congress contemplated such coordination is shown by section 202(a) of the act, which declares it to be the policy of Congress, among other things, to 'improve the relations between, and coordinate, transportation by and regulation of, motor carriers and other carriers.' It is also shown by section 213(a)(1), which permits a railroad to acquire a motor carrier, provided we find that the acquisition will promote the public interest by enabling the railroad to 'use service by motor vehicle to public advantage in its operations', without undue restraint of competition."* (Emphasis supplied.)

The Commission thus satisfied itself that the proposed substituted service met the standard previously established by the Commission for determining public convenience and necessity in motor carrier cases in that it would "serve a useful public purpose, responsive to a public demand or need" (p. 234 of 10 M. C. C.).

(b). ***Requirement of a Showing that the Proposed Substituted Service Could not Be Satisfactorily Provided by Existing Independent Motor Carriers.***

Next the Commission turned to the question whether the useful public purpose furthered by substituted service could be "served as well by existing lines or carriers" (p. 234 of 10 M. C. C.). It pointed out that the railroad regarded coordination of independent motor carriers as impractical because it could expect no bona fide coordination or cooperation from them in view of their position as competing over-the-road carriers. The Commission further pointed out that it could not compel service between motor carriers and railroads, and such service would therefore depend on voluntary cooperation. It also observed that no one of the existing motor carriers served all of the stations which the railroad served, and the railroad would therefore have to make arrangements, not with one but with several of the existing motor carriers, each of which would perform a "more or less disjointed part of the service." Finally, it observed that effective coordination would require adjustment of schedules and operating conditions, which would be difficult and would not admit of the desired flexibility, if the service were wholly dependent on voluntary cooperation between the railroad and existing independent competing motor carriers. The Commission accordingly concluded that "coordinated service through the voluntary cooperation of all or some of the protesting motor carriers is not here practicable," and the "'useful public purpose' which the proposed new operation will serve cannot 'be served as well by existing lines or carriers' " (p. 236 of 10 M. C. C.)

In this connection, it is appropriate to recall the Commission's language in the *Barker* case, quoted above (p. 38), where it spoke of "coordinated truck-and-rail service" as a service "properly *synchronized under a single management.*"

(c). Attachment of Restrictive Conditions Designed to Protect Existing Independent Motor Carriers Against General Over-the-Road Competition from Railroad-Controlled Motor Carriers.

The Commission finally determined in the *Kansas City S. Transport Co.* case that the proposed new coordinated service would not endanger or impair the general operations of the existing motor carriers, contrary to the public interest, if proper restrictive conditions were attached. The service of transporting less-than-carload freight to, from and between way-stations on the railroad's line was a service which the railroad was obligated to perform in any event, and which it already was performing in competition with existing motor carriers, by the use of peddler-cars in local freight trains. The proposed substituted service would simply provide the railroad with a new and improved facility for performing this obligatory service, in a manner which would better meet the public need. In this connection the Commission observed (page 238):

> "We do not believe that the development of this new form of service will seriously endanger the operations of protestants, but, in any event, *the public ought not to be deprived of the benefit of an improved service merely because it may divert some traffic from other carriers. If that principle had been followed, indeed, no motor-carrier service could have been developed.*" (Emphasis supplied.)

In order to insure that the motor vehicle operations under the certificate sought would be confined to service auxiliary to and supplemental of rail transportation, in accordance with the policy established by the Commission in the *Barker* case, the Commission, in granting the certificate in the *Kansas City* case, attached conditions to

the effect that (1) the service to be performed should be limited to service auxiliary to or supplemental of the rail service of the railroads in question, (2) the applicant motor carrier "shall not serve or interchange traffic at any point not a station on the rail line" of the railroad in question, and (3) the applicant motor carrier should not transport shipments other than those which it received from or delivered to the railroad and which were the subject of a prior or subsequent movement by rail (page 240 of 10 M. C. C.).

The third and last of these restrictive conditions was subsequently, upon reconsideration by the Commission, found to be unduly restrictive and indeed to prevent the adequate accomplishment of the purposes sought to be attained by the substituted service. In a reopening and reconsideration of the *Kansas City S. Transport Co.* case, *Kansas City S. Transport Co., Inc., Com. Car. Application*, 28 M. C. C. 5 (1941), the applicant motor carrier, having had the benefit of operating experience under the conditions imposed in the Commission's previous decision, claimed that the condition requiring a prior or subsequent rail haul for all shipments handled in the substituted service was too restrictive and to a large extent defeated the purpose of the substituted service, in that it prevented the complete discontinuance of the costly and inefficient peddler-car train service for handling less-than-carload freight.

Thus, under its tariffs, the railroad was obligated to haul not only through freight destined to or originating at a local way-station, but also freight originating at one local way-station for movement to another local way-station. For example, in the case of local freight service between points A and E, the substituted motor vehicle service, operating under the requirement of a prior or subsequent rail haul, could take care of less-than-carload freight coming into A by rail and destined to B or C intermediate between A and E, by means of a motor

vehicle movement from A to B or C, or it could take care of freight originating at B or C and destined to a point beyond E, by means of a motor vehicle movement from B or C to E and rail movement beyond. But the condition requiring a prior or subsequent rail haul prevented the handling by substituted motor vehicle service of purely local less-than-carload freight originating at B, for example, and destined to C, both intermediate between A and E, and it was therefore necessary to continue the costly and inefficient operation of peddler cars in way-freight trains for handling less-than-carload traffic between such intermediate stations.

Impressed by this practical disadvantage of the condition requiring a prior or subsequent rail haul, the Commission, speaking through Commissioner Eastman, concluded, in the second *Kansas City S. Transport Co.* case, that instead of that condition there should be substituted a new and different condition which would prevent the use of substituted service for movements of less-than-carload freight from one so-called break-bulk or key point—such as A in the example given above—to another break-bulk or key point—such as E—where there was adequate through rail service between such break-bulk or key points, but would not prevent the handling in motor vehicle substituted service of less-than-carload shipments originating at such break-bulk or key points and destined to intermediate points—such as B or C—or shipments originating at one such intermediate point, *e. g.*, B, and destined to another such intermediate point, *e. g.*, C. Thereby the complete elimination of the peddler-car method of handling less-than-carload freight in way-freight train service, and the substitution therefor of motor vehicle service, with its resultant increased economy and efficiency of operation and improved service to the shippers, was made possible. Commissioner Eastman expressed this conclusion in the following language (p. 10 of 28 M. C. C.):

"Upon further consideration, we are of the opinion that the division gave insufficient weight to the fact that the railroad, as well as the independent motor carriers, has been and is furnishing service between the stations, but that between many of them the present means of railroad service, the way-freight train, is uneconomical and inefficient. This is the reason for coordinating truck service with the rail service, and, as we have found (and as division 5 also found), public convenience and necessity require the increased economy and efficiency which will result from such substituted use of trucks. *By the same reasoning, however, public convenience and necessity require the substitution of trucks for way-freight train service regardless of whether there is a prior or subsequent movement by rail. Such substitution is a part of the plan of coordination, and unless it can be accomplished, the full benefits in increased economy and efficiency which the public interest demands cannot be secured.*" (Emphasis supplied.)

In this second *Kansas City S. Transport Co.* case, the Commission also considered in some detail and with considerable care the contention made by protesting motor carriers that the useful public purpose sought to be accomplished by the substituted motor vehicle service could be served equally well by existing motor carriers, without adding new operations to the sum total of existing facilities. In support of their contention in this respect, the protesting motor carriers proposed three alternative plans for the utilization of existing carriers. The first of these involved the handling of package freight by the Railway Express Agency on passenger trains. It was contended that this service could be expanded to include all the less-than-carload freight which would be handled by the proposed substituted service. It was not shown, however, that the existing service of the Railway Express

Agency would be adequate for this purpose or would result in improved efficiency and economy or other advantages either to the Agency or to the railroad. This alternative was accordingly dismissed by the Commission.

The second alternative suggested by the protesting motor carriers in that case involved resort to a scheme of proportional rates; but such proportional rates were found to be closely analogous to those which the Commission and this Court had previously held to be unlawful (see *United States* v. *Chicago Heights Trucking Co.*, 310 U. S. 344 (1940)). Further consideration of that alternative was therefore precluded, leaving only the third alternative as being worthy of consideration.

The third alternative proposed by the protesting motor carriers required resort to joint rates agreed to between the railroad and the independent motor carrier. Such an arrangement would, of course, depend upon voluntary cooperation between the railroad and the independent motor carrier; and the Commission again reviewed the objections to such procedure which it had listed in its prior opinion in the *Kansas City S. Transport Co.* case, viz., the necessity of having a series of disjointed arrangements with a number of independent motor carriers in order to serve all points which the railroad is obligated to serve, the difficulty of achieving flexible and practicable schedules and operating arrangements, and the likelihood that the independent motor carriers, which were competitors with the railroad for over-the-road line-haul business as well as for local business, would take unfair advantage of their joint arrangements with the railroad to solicit traffic away from it and to impair its service by giving better attention to their own competing motor service.

From this review of the alternatives suggested by the protesting motor carriers, Commissioner Eastman, for the Commission, concluded as follows (page 21 of 28 M. C. C.):

> "Having in mind that, for the reasons above indicated, only the joint-rate plan is available, that

under that plan applicant would find it necessary to *divide control over and responsibility for* less-than-carload service in the affected area with motor carriers which would continue to afford a competing all-motor service, and that the unit costs of the motor service would be materially higher than under applicant's plan with no assurance of offsetting savings in truck-miles, *we find that the useful public purpose which would be served by coordination of rail and truck service could not be served as well by existing motor carriers as under applicant's proposed plan.*" (Emphasis supplied.)

3. *The Policy Thus Developed by the Commission with Respect to Substituted Service is in Accordance with the Provisions of the Act and in Furtherance of the Declared Policy of Congress.*

Thus the Commission, after a careful and exhaustive review and analysis in a number of cases of the practical advantages of the substitution of motor for rail movement of less-than-carload freight to, from and between way-stations on a rail line, and of the various objections made thereto by protesting parties, has concluded that it is in furtherance of the national transportation policy, as declared by Congress in the Interstate Commerce Act, and is in accord with the statutory standards set up in that Act for the Commission's guidance, to permit such substituted service to be furnished by a motor carrier subsidiary of a railroad, subject, however, to conditions of the kind described above, designed to insure that the substituted service will be used only as auxiliary to and supplemental of rail service, and upon a showing which establishes two factors: first, that the substituted service will serve a useful public purpose, and second, that it is a service which cannot be practicably provided by existing independent motor carriers, under their established operating rights.

With regard to the first of these two factors, the Commission considers that an adequate showing has been made if it is established that the substitution will result in expedited and otherwise improved service to shippers and in increased economy and efficiency of the railroad's operations, as for example, through the elimination of wasteful transfers and the haulage of lightly loaded cars, with resultant reduction in operating costs. That the Commission's position in this respect is fully in accord with the policy and provisions of the Act is made plain by a consideration of the Congressional declarations of policy set forth above (pp. 24-25), and particularly the declaration that the policy of Congress is "to promote * * * economical and efficient service and foster sound economic conditions in transportation and among the several carriers." The Commission's position is also in accord with the statement of this Court in *N. Y. Central Securities Co.* v. *U. S.*, 287 U. S. 12 (1932), with reference to the policy of the Interstate Commerce Act to the effect that "the public interest is served by economy and efficiency in operation" (p. 23 of 287 U. S.).

With regard to the second of the two factors required by the Commission, viz., that the proposed substituted service cannot be satisfactorily supplied by existing independent motor carriers, the Commission has indicated in its decisions that a sufficient showing is made by the fact that substituted service if provided by existing independent motor carriers would depend on their voluntary cooperation and would therefore be likely to be lacking in important elements of coordination, with probable impairment rather than improvement of the railroad's service. Its reasoning in this respect is illustrated by the following language from its opinion in *Louisiana, A. & T. Ry. Co. Common Carrier Application*, 22 M. C. C. 213 (1940), a case in which an application, similiar to that involved in the present case, by a motor carrier subsidiary of a railroad, for permission to engage in substituted service for the railroad, was granted (page 216 of 22 M. C. C.):

"While there are a number of motor carriers operating in the considered territory, the Railway contends that any such plan of coordination through the utilization of their service would be impracticable. Only one of the protestants is shown to operate between Shreveport and Dallas. This carrier operates over the proposed route between Jefferson and Dallas, but it does not serve—*nor is it shown that all of the protestants collectively serve—all of the points involved. In order to establish the coordinated service through the cooperation of these motor carriers, it would be necessary, therefore, for the Railway to make arrangements not with one, but with several, each performing a more or less disjointed part of the entire service, and it would be necessary for them to secure authority to serve rail points which they do not now serve.* Moreover, most if not all serve points, and often important points, not served by the Railway. *They would find it difficult to adjust their schedules to meet the needs of the coordination with the rail service without disrupting or impairing their service to the off-rail points.* * * * Furthermore, we are without jurisdiction to compel coordinated service between carriers by rail and carriers by motor vehicle. It could only be accomplished through the medium of through routes and joint rates, and we have no power to require their establishment. It follows that any such plan must be dependent on voluntary cooperation. *In view of the close adjustment of schedules and interchange arrangements which good, dependable service requires, as well as the joint use of facilities, we believe the Railway has sound ground for its contention.*" (Emphasis supplied.)

The Commission's position on this point has been well summarized by it in another case of the same character, *Pacific Motor Trucking Co. Common Carrier Application*, 21 M. C. C. 761 (1940), as follows (p. 763):

"The points in question are admittedly served by other motor carriers, and protestants on exceptions contend that public convenience and necessity therefore do not require the proposed operation. While adequate motor-carrier service, as such, is no doubt available, *we have somewhat consistently refused to compel rail carriers to make their coordinate efforts dependent on competing motor carriers.* It is clear that applicant's proposed service will expedite deliveries of less-than-carload shipments now moving by rail and will in some instances supply pick-up and delivery service not now available. It will also result in an improved service with respect to carload traffic by permitting a better adaption of remaining train schedules to its needs. In addition some economies in operating expenses will be effected. *There is no question that the proposed rail-truck coordinated service is in the public interest.* We have in several instances granted similar authority to other carriers." (Emphasis supplied.)

Of the many examples of cases in which the Commission has granted permission to motor carrier subsidiaries of railroads to engage in substituted service for the railroads, on a showing of facts similar to those shown in the present case, the following may be cited as typical illustrations, in addition to those cited above:

Indiana R. Extension—Fort Wayne, 21 M. C. C. 73 (1940);

Willett Co. of Indiana, Inc., Extension—Ill., Ind. & Ky., 21 M. C. C. 405;

Rock Island Motor Transit Co. Com. Car. Application, 21 M. C. C. 513 (1940);

Missouri Pac. R. Co. Common Carrier Application, 22 M. C. C. 321 (1940);

Texas & Pacific M. Transport Co. Ext.—Pecos-El Paso, Tex., 33 M. C. C. 38 (1942).

That this established policy of the Commission, with respect to the second factor referred to above, is in accord with the policy and provisions of the Act is clear from a consideration of the provisions declaring a Congressional policy in favor of coordinated rail and motor service (see pp. 24-25, above), and the provisions permitting a railroad to acquire control of a motor carrier if the railroad will thereby be enabled "to use service by motor vehicle to public advantage in its operations" (see pp. 25-26 above). Practical and efficient coordination, the Commission finds, is more likely to result from a substituted service "properly synchronized under a single management"*—*i. e.*, operating under the unified control of the carrier which is obligated to render the service, viz., the railroad—than from a joint arrangement between that carrier and its competitors, the existing independent motor carriers. As aptly stated in Mr. Justice Rutledge's opinion in the *McLean Trucking Co.* case (321 U. S. 86):

> "* * * the Motor Carrier Act is to be administered with an eye to *affirmatively improving transportation facilities, not merely to preserving existing arrangements* or competitive practices." (Emphasis supplied.)

Even if the preservation of competition were the sole test—and it is clear from the provisions of the Act, as well as from the language of this Court in the *McLean* case (see pages 24-25, 30-32 above), that it is not—the policy thus established by the Commission with respect to such substituted service would meet that test, first, because the granting of authority to a railroad-controlled motor carrier for operation of such substituted service improves the quality and efficiency of that portion of the railroad's service and thereby sharpens the competition between that service and the competing services of independent

* *Pennsylvania Truck Lines, Inc.—Control—Barker*, 1 M. C. C. 101 (1936), at p. 105 (see discussion at pp. 38-39 above).

motor carriers, and, secondly, because the acceptance of the suggested alternative—viz., the operating of this service through voluntary joint-rate arrangements with independent competing motor carriers—would place such competing motor carriers in a position where they could stifle competition by giving operating preference to their own service, instead of to the service performed by them for and on behalf of the railroad.

The substitution by a railroad, through its wholly-owned subsidiary or its own direct operations, of motor vehicle for rail movement of less-than-carload freight in local way-freight service, has thus become an established and recognized service, which the Commission after careful consideration has found to be to the public advantage, in accordance with the policy and purpose of the Interstate Commerce Act, where the requisite showing is made and where the appropriate restrictive conditions are attached. The many considerations and factors relevant to a determination of the proper policy to be pursued with respect to this substituted service have been carefully weighed by the Commission and it has evolved this as its established policy, in the light of its expert knowledge and informed experience, and in the exercise of the broad discretion vested in it to carry out the national transportation policy and to administer the provisions of the Interstate Commerce Act, including the motor carrier provisions here applicable. As this Court said in the *McLean Trucking Co.* case (321 U. S. at p. 87):

> "Resolving these considerations is a complex task which requires extensive facilities, expert judgment and considerable knowledge of the transportation industry. Congress left that task to the Commission 'to the end that the wisdom and experience of that Commission may be used not only in connection with this form of transportation, but in its coordination of all other forms'."

The fact that this substituted service is of public advantage, in that it provides a new and improved method of performing an essential part of a railroad's over-all transportation service, has been recently recognized by this Court. In *Thomson* v. *United States*, 321 U. S. 19 (1944), this Court was confronted with the question of whether or not a railroad might properly apply in its own name for a certificate to operate as a motor vehicle common carrier, under the so-called "grandfather clause" of the Act, for the purpose of engaging in substituted service operations—a question which is not involved in the present case. In holding that the railroad might properly make such an application, this Court, speaking through Mr. Justice Murphy, characterized the proposed substituted service in the following language (pp. 20-21, 24):

> "The motor trucks transport less-than-carload lots of freight in complete coordination with the rail service. *The railroad instituted this additional method of transportation in order to furnish an improved and more convenient freight service to the public in certain areas of light traffic and in order to curtail car mileage and way-freight service.* Motor vehicle transportation, in other words, is merely a *new method of carrying on part of its all-rail freight business in which it had been engaged for many years.*
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> • • • • • • •
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> "The undisputed facts here disclose that only the railroad holds itself out to the general public to engage in a single complete freight transportation service to and from all points on its lines. As an integral and essential part of this service tendered by the railroad, motor vehicle transportation between certain stations is provided. *It is completely synchronized with the rail service and has none of the*

elements of an independent service offered on behalf of the motor vehicle operators. Their operations are the operations offered by the railroad as component parts, not as separate or distinct segments, of its single service. They may be replaced or eliminated at the sole discretion of the railroad." (Emphasis supplied.)

This Court has thus plainly recognized that such substituted service constitutes simply an improved method whereby the railroad performs by motor vehicle a portion of the service which it is obligated to perform, with resultant public advantage, and that such substituted service is a service which the railroad should therefore be permitted to furnish.

In this connection it should be noted that a case exactly like the present case, except that the application was made by the railroad itself instead of by a subsidiary of the railroad, has recently been considered and decided by the Supreme Court of Iowa. The railroad applied to the Iowa Commission for a certificate of convenience and necessity, under the applicable Iowa statute, to permit the railroad to engage in substituted motor vehicle service operations. The application was resisted by existing motor carriers who had operating rights over the routes in question, on the same grounds which have been urged by the protesting motor carriers in the present case. The Iowa Commission denied the application on the ground that the proposed service could be adequately supplied by the existing motor carriers. This was held to be erroneous, by the Iowa Supreme Court, in *Thomson* v. *Iowa State Commerce Commission*, 15 N. W. (2nd) 603 (Ia. 1944). In holding that the certificate should have been granted, the Iowa Supreme Court made the following statements:

"In determining whether the Commission or the trial court was right in deciding the effect to be given

the record made by the resisting carriers, *it is vitally important to bear in mind that the service the railroad seeks authority for is merely auxiliary to, supplemental of, and coordinated with its rail service.* Were this an application by an ordinary truck operator to merely duplicate existing motor carrier service, there is little doubt that the denial of the application was adequately supported by the record. *It is only when proper emphasis is placed upon the specical kind of service and its limitations as such that the erroneous character of the commission's decision becomes apparent* (p. 608 of 15 N. W. 2nd).

* * * * * * *

"The protesting motor carriers furnish no transportation by rail. No one of them is authorized to operate over the entire territory involved. Collectively, they do serve the territory as motor carriers only. *But they do not and cannot furnish the type of service here proposed. It could be supplied only through agreements with the railroad.* Most, if not all, of the intervenors offered assurances that they would be willing to work with the railroad. The testimony of the railroad's witnesses was that *no satisfactory arrangement had been worked out and that none was possible because so many conflicting details in the operations of so many systems made proper coordination impossible* (p. 609 of 15 N. W. 2nd).

"The question here before us has been passed upon many times by the Interstate Commerce Commission. * * * (p. 609 of 15 N. W. 2nd).

"Of course, the decisions of the Interstate Commerce Commission are not binding precedents upon this court. However, the principles, announced and applied in the foregoing decisions, are so eminently fair, sound, just and reasonable that we have no

hesitancy in adopting them as tenets which should be applied in determining whether the commission should have issued a certificate of public convenience and necessity under the facts herein. * * * (p. 610 of 15 N. W. 2nd).

"Prior to the construction of such a system of highways, the railroads had no substantial competition from motor carriers. With the development of such highways, however, motor carriers of freight were authorized to operate thereon and developed direct competition with the railroads. The railroads felt the effect of such competition. But they could not stifle it. They could only endeavor to meet it. *The public interest is paramount and must prevail over the interests of any particular group. Now this railroad seeks to do that, which the Interstate Commerce Commission has authorized throughout the country, to-wit; improve its service by an auxiliary or supplemental system of coordinated rail and truck service. The public wants such service. It is definitely convenient and reasonably necessary. The public is entitled to it* (p. 611 of 15 N. W. 2nd).

* * * * * * *

"Various motor carriers resisted the application. But, under the record here made, *they have no more right to deprive the public of the service here proposed than the railroads would have had to deprive the public of the services of motor carriers.* * * *" (p. 611 of 15 N. W. 2nd). (Emphasis supplied.)

The same problem has also been recently considered and the same conclusion reached by the Supreme Court of South Dakota. In *Application of Megan*, 5 N. W. (2d) 729 (S. D., 1942), an application by a railroad for a certificate of public convenience and necessity, under the state statute, to engage in motor carrier operations incidental or auxiliary to railroad service, was granted by

the state commission. In sustaining this action, the Supreme Court of South Dakota said (p. 736 of 5 N. W. (2d)):

> "We now hold that the commission, in the exercise of its discretion, may consider whether a proposed service will promote the public interest by strengthening and preserving an indispensable transportation service. That there was a basis in the circumstances established by the evidence for a rational conclusion that purely incidental movement of l. c. l. freight between stations by truck would not only improve the character of applicant's railroad services to the public, but would also add vitality to a failing indispensable transportation service, we are convinced."

II.

THE FACTS.

On the Basis of the Commission's Findings, Supported by Evidence, Its Action in this Case, in Permitting the Railroad, through its Motor Carrier Subsidiary, to Substitute Motor for Rail Movement of Local Less-than-Carload Freight, Subject to the Usual Conditions Attached in such Cases, is in Accord with the Commission's Established Policy for Handling such Cases, Which Policy is in Accord with the Applicable Provisions of the Act and the Declared Policy of Congress.

The present case arises out of an application by a wholly-owned motor carrier subsidiary of a railroad for a certificate permitting the motor carrier to operate for the railroad in substituted service between certain specified points. The applicant motor carrier, known as the Willett Company of Indiana, Inc., is already authorized to operate over routes that parallel almost the entire western regional system of the railroad which owns it, viz., the Pennsylvania Railroad. By its application in this case

the Willett Company seeks additional authority, so that it may extend its operations to certain portions of the railroad's line lying between Fort Wayne, Indiana, and Mackinaw City, Michigan, thereby rounding out a complete service auxiliary to the western regional system of the railroad. Over certain routes between these points, applicant proposes to engage in motor vehicle service in substitution for the rail movement of less-than-carload freight in local way-freight service. The operations which the Willett Company seeks permission to perform have been correctly described by the Commission as follows (R. 7-8):

> "The operations under consideration would be limited to line-haul movements between stations on lines of the railroad. Applicant would render service which is auxiliary to, and supplemental of, the rail service in the transportation of less-than-carload freight. The general plan of this coordinated service is to transport such traffic by rail between key or break-bulk stations and thence by truck to the intermediate or way-stations. Conversely, the applicant would collect freight at the way stations and transport it to the key stations for movement beyond by rail.
>
> "Generally speaking, the termini of each of the connecting routes are relatively large cities or important junction points on the main line of the railroad extending between Fort Wayne and Mackinaw City. Fort Wayne and Grand Rapids have been selected by applicant as key points. Points on the branch lines will be served by motor vehicles operating to and from Grand Rapids. The rail service between Fort Wayne and Grand Rapids is frequent and the volume of tonnage is heavy, whereas the intermediate points receive less tonnage and less frequent service. This is also true at the points north of Grand Rapids with the exception of Cadillac, Traverse City and Petoskey, Michigan."

A. THE EVIDENCE SHOWS AND THE COMMISSION HAS FOUND THAT THE PROPOSED SUBSTITUTED SERVICE WOULD RESULT IN OPERATING ECONOMIES AND EXPEDITED SERVICE AND WOULD THEREFORE SERVE A USEFUL PUBLIC PURPOSE.

At the hearing held before the Joint Board on the Willett Company application, the evidence showed that the proposed operations would result in more efficient loading of freight cars and in the release of needed freight cars for use in through trains, would bring about substantial savings in the expense incurred by the railroad in furnishing the less-than-carload way-freight service which it is obligated to furnish between the points in question, would make possible faster and more frequent service in the delivery of less-than-carload traffic, through the use of motor trucks, and would also result in improvement in the local carload freight train service, through the elimination of the less-than-carload peddler cars in those trains (see pp. 7-8 above). On the basis of this evidence, the Commission found as follows (R. 8):

> "The railroad will continue to transport carload freight but will discontinue the operation of 'peddler' cars in local freight trains. The substitution of motor-for-rail service over the considered routes will release freight cars for use in through-freight trains and will result in the elimination of over 61,000 car-miles per month, and of approximately 860 car-days per month. For every freight car eliminated the necessity for switching that car in the yards also will be eliminated as well as the attendant expense. The proposed operations will expedite the movement of less-than-carload traffic from 24 to 48 hours and will provide daily instead of tri-weekly service at several points."

More than 40 shippers and receivers of freight at points on the rail line in question testified in support of

the application, and their testimony showed that they would like to have the proposed substituted service made available to them, because it would result in faster and more frequent service and would make it possible for them to continue to deal with the railroad as the single transportation agency responsible for the whole movement, which they preferred to do (pp. 9-11 above). This evidence was considered in detail by the Commission and was summarized by it as follows (R. 8-9):

> "* * * numerous shippers and receivers of freight at points on the rail line expressed a belief that this type of service would be advantageous to them in their business enterprises. * * * These shippers consider the coordinated service essential to their respective businesses and desire that such service be instituted."

Thus on the evidence before it, the Commission has expressly found that the proposed operation would result in improved service to shippers and in increased economy and efficiency in the railroad's operations, and would therefore enable the railroad to use such service "to public advantage in its operation," and would "serve a useful public purpose, responsive to a public demand or need" (see p. 42 above).

B. The Evidence Shows and the Commission Has Found That the Proposed Substituted Service Could Not Be Satisfactorily Supplied by Existing Independent Motor Carriers.

Having thus found that the first factor required to be shown under its established policy, viz., the serving of a useful public purpose, was satisfactorily established, the Commission turned to the second factor, viz., whether or not the proposed service could be satisfactorily supplied by existing independent motor carriers. The independent competing motor carriers with existing operating rights,

who appeared in opposition to the Willett Company's application, contended that the desired substituted service could be adequately supplied by them under their existing operating rights.

On this point, it was of course in evidence that the application of the Willett Company was being made by a motor carrier subsidiary of the railroad, which was already providing similar substituted service for the railroad over most of the railroad's Western Region (R. 86, 93). It followed logically from this that the proposed service would be operated under a "synchronized management" with the railroad, in better coordination with the railroad's own operations, than would be likely to be the case if the service were supplied by the existing independent motor carriers (R. 124-25, 143). Moreover, there was evidence to show that none of the existing independent motor carriers served all of the points in question on the railroad's line, which the railroad was obliged to serve in some manner and which it proposed to serve through the substituted service (R. 443, 518, 598-99, 637-38, 647-48, 651-53, 656-58, 662). There was also evidence to the effect that existing operating schedules of independent motor carriers would not fit properly into connecting rail movements, and that substantial rearrangements would be required for proper coordination (R. 637-38, 652-53). Actual experience on the part of the railroad in utilizing an independent motor carrier for this service between some of the points in question had also shown such an arrangement to be unsatisfactory (R. 390-91).

In further answer to the contention of the protestants on this point, the Pennsylvania Railroad, as intervenor in support of the Willett Company's application, offered additional evidence to prove before the Joint Board that it preferred to use its own subsidiary, rather than existing independent motor carriers, for the proposed service, because (1) it already employed the Willett Company in other service of the same type over many other routes and

it would suit its operations better to have the same motor carrier provide all of this type of service, (2) better coordination of operating schedules and other operating arrangements would result from a unified service provided by one motor carrier subject to the railroad's control, (3) the Willett Company would not be hauling for any other patron than the Pennsylvania Railroad, would not mix its freight with the freight of other patrons, and would not be in general competition with the railroad and therefore would not be inclined to subordinate its service for the railroad to other service rendered by it, as would be the case with independent motor carriers, and (4) the Willett Company, being a subsidiary of the railroad which is obligated to perform the service, would be generally more dependable and more likely to fit in with the railroad's needs (R. 365-366). This offer of proof on behalf of the railroad was excluded from the record by the Joint Board, on the ground that "that issue is not involved in this case" (R. 364, 367)—possibly because the Joint Board regarded the issue in question as already settled by the established policy of the Commission. Such exclusion did not of course present any ground for objection by the railroad or the applicant, after the Commission had determined the issue in their favor by granting the application.

The Commission, in disposing of this contention on the part of the protesting motor carriers, followed the precedent which it had established in the *Kansas City S. Transport Co.* case and subsequent cases (see pp. 43, 47-52 above), and concluded that the desired service could not be satisfactorily furnished by the protestant independent motor carriers under their existing operating rights. In reaching that conclusion, the Commission relied, first, on the fact that those existing operating rights were not sufficiently broad to permit any one of the protestant carriers to serve all of the points which the railroad was obligated to serve and which it would serve with the sub-

stituted service to be provided by the applicant, and, secondly, upon the fact, fully discussed in the *Kansas City S. Transport Co.* case (see pp. 43-44, 48 above), that the less-than-carload freight service in question was a service which the railroad was obligated to render and which could therefore be better and more efficiently rendered by a coordinated service synchronized under the railroad's own management than it could by a service which depended on the voluntary cooperation of independent competing motor carriers (see pp. 47-53 above). On this point, the Commission found as follows (R. 10-11):

> "While several motor carriers operate over portions of the routes involved and in some cases perform similar station-to-station service for the Pere Marquette Railroad, it must be borne in mind that the railroad has been and is transporting the traffic in question between stations, and is under an obligation to continue to do so. Applicant's service will be of a different character from that performed by motor carriers generally. It will be limited to the handling of merchandise traffic to and from points on the lines of the railroad in substitution for train service. *To utilize the facilities of protestant motor carriers, the railroad would be required to make arrangements with several of them, each performing a more or less disjointed part of the service. The railroad through its subsidiary, merely seeks the substitution of a more efficient for a less efficient means of service.*" (Emphasis supplied.)

In concluding, the Commission referred to a previous decision by it regarding the Willett Company of Indiana, in which it had granted authority to that Company to operate along other routes of the Pennsylvania Railroad, for the purpose of making possible substituted service of a similar character; *Willett Co. of Indiana, Inc. Extension—Ill., Ind. & Ky.*, 21 M. C. C. 405 (1940). In its

opinion in the present case, the Commission summarized its decision in the earlier Willett Company case as follows (R. 11):

> "In the Willett Co. Case, division 5 concluded that the coordinated rail-truck service differs from the service given by the railroad alone or by competing motor carriers alone. It is a new form of service utilizing both rail and motor carrier transportation to advantage and in such a way as to render a merchandise service which is much less expensive and at the same time more expeditious and more convenient and generally satisfactory to the public served. Applicant has been performing such service in conjunction with the railroad over its other routes since prior to October 15, 1935. It is clearly shown that many benefits are derived from such coordinated service."

The Commission then finally concluded (R. 11):

> "*The Motor carrier service proposed by applicant, operated in close coordination with the railroad's service, will effectuate a reduction in cost and will result in an increase in efficiency in the transportation over the routes herein considered, which will inure to the benefit of the general public.* Furthermore, it does not appear that the restricted service would be directly competitive or unduly prejudicial to the operations of any other motor carrier. We are not impressed by protestants' contentions and are of the opinion that the proposed coordinated service will serve a useful public purpose and that such useful public purpose can not be served as well by existing motor carriers. Applicant is able financially and otherwise to conduct the described operations." (Emphasis supplied.)

The Commission accordingly granted the authority sought, subject, however, to the usual conditions imposed by it upon such grant of authority, designed to limit the service to that which is auxiliary to and supplemental of rail service, as established in its decision in the second *Kansas City S. Transport Co.* case and subsequent cases (see pp. 45-49 above).

C. THE COMMISSION'S ACTION IN THIS CASE IS IN ACCORD WITH THE POLICY ESTABLISHED BY THE COMMISSION FOR HANDLING CASES OF THIS CHARACTER, WHICH POLICY IS IN ACCORD WITH THE APPLICABLE PROVISIONS OF THE ACT AND THE DECLARED POLICY OF CONGRESS.

Thus the facts of the present case, as demonstrated by the evidence before the Commission, bring it squarely within the policy evolved by the Commission, for cases of this character, after careful consideration over a number of years. The evidence shows, beyond question, and the Commission has found, that the proposed operation would result in improved service to shippers and in increased operating economy and efficiency. The evidence also shows clearly, and the Commission has found, that the proposed service could not be satisfactorily furnished by existing independent motor carriers. The case accordingly falls squarely within the principles established by the Commission in the *Barker* and *Kansas City S. Transport Co.* and subsequent cases.

Protestants' attack on the Commission's order permitting the desired substituted service, and the decision of the court below setting aside the Commission's order, represent nothing more than a frontal attack on the Commission's whole policy with respect to substituted service cases. Protestants and the court below are challenging the Commission's exercise of the administrative discretion vested in it by Congress, under the Interstate Commerce Act, to carry out the provisions and declared policy of the Act. Neither the protestants nor the court

below have pointed to, or can point to, any provision in the Act which is contravened by this established policy of the Commission or by its decision in the present case. On the contrary, the Commission's policy in this respect, and its decision here, fall squarely within the scope of the provisions of the Act and of the national transportation policy therein declared by Congress. Protestants and the court below in effect dispute the wisdom of the policy thus carefully developed by the Commission, in the light of its expert knowledge and informed experience. On such an issue, there can be no doubt that Congress intended, as this Court has held, that the informed and expert administrative judgment of the Commission must prevail.

III.

ERROR OF PROTESTANTS AND THE COURT BELOW.

The Position of the Protesting Independent Motor Carriers in this Case, and the Decision of the Court Below Sustaining that Position, are Contrary to the Applicable Provisions of the Act and Would Result in the Frustration Rather than the Fulfillment of the Congressional Policy Declared Therein.

The attack made by the protesting independent motor carriers before the Joint Board and Commission, and as plaintiffs in the court below, upon the application here in issue and upon the Commission's action in this case amounts to an attack upon the policy which the Commission has carefully evolved and adopted for handling substituted service cases of this character, as set forth above (pp. 39-49). The substance of protestants' contention was that, as a matter of law, the Commission is required in cases of this character to refuse to grant authority for the substituted service sought unless it is shown that existing

rail and motor facilities are physically inadequate, and are, in fact, so bad that shippers and receivers of freight are dissatisfied and are demanding a change. This position of the protestants appears from the exceptions which they filed to the proposed report made by the Commission's Examiner (R. 734-803). It is also made manifest by the type of evidence which protestants introduced before the Joint Board, in opposition to the Willett Company's application. This evidence of protestants, as well as the cross-examination directed by their counsel to the witnesses supporting the application, was designed to show that at least some shippers were not dissatified with existing rail and motor service and facilities (R. 255, 270, 286-87, 304-5, 466, 484, 491, 506, 525, 538, 545, 550, 556, 572, 575, 589).

That this was the position of protestants and was adopted by the court below is plain, not only from the fact that that court enjoined the Commission's order granting the Willett Company's application, but also from the language of the court's so-called "Special Findings of Fact." In those "Special Findings" the court said (R. 45):

> "*No proof was made or offered by the applicant or presented in evidence that present highway common motor carrier transportation service* by duly certificated carriers operating in interstate or foreign commerce and serving the points proposed to be served by the applicant *was or would be inadequate to serve the public need therefor.* Proof was presented before the Commission by the plaintiff and other protestants concerning the *adequacy of existing common motor carrier service.* There was no substantial evidence to prove public convenience and necessity." (Emphasis supplied.)

The court thus obviously adopted the protestants' position that the applicant in a case of this character

must show actual physical inadequacy in the common carrier service of existing motor carriers, before its application for substituted service can be granted.

This position is plainly erroneous, in that it completely misses the issue presented by an application for substituted service, such as is involved in the instant case. Here the question is, not whether there should merely be more motor carrier service of the kind already supplied by existing motor carriers, but whether a railroad, in offering and supplying its own railroad service, shall be permitted to make use of motor carrier facilities either directly or through its own motor carrier subsidiary, with resulting increase in the efficiency and economy of its railroad operations. The contentions of the protestants completely disregard the latter question, and this position of theirs is demonstrably erroneous in two respects.

In the first place, they assume that the Commission is required by law, in substituted service cases of this kind, to be guided only by a determination of whether existing motor carrier service is physically inadequate, thereby completely ignoring the test of whether or not the efficiency and economy of the transportation system would be improved and promoted by permitting the kind of substituted service sought. As a matter of fact, the provisions and policy of the Act make it plain that in such a case the Commission is not merely authorized, but is required, to apply the latter test and is not to be guided by a test of the kind urged by protestants.

Secondly, the position of the protestants assumes that in cases of this character the Commission, in determining whether a railroad may use motor vehicles in the performance of a railroad service, must confine its attention to the question of whether or not there is existing adequate motor carrier service in the same territory, and that the Commission is without statutory warrant to permit a railroad to employ motor vehicles of its own, or of its motor carrier subsidiary, for the better performance,

of the service which the railroad is obliged to render, unless the Commission finds that there are no existing independent motor carriers with facilities sufficient to carry the freight in question.

A. Error of Assuming that a Test of Physical Inadequacy of Existing Facilities Must be Applied and Regarded as Controlling.

Protestants, in contending, as they do, that authority to engage in substituted service of this character may not be granted unless it is found that existing facilities are so physically inadequate as to cause dissatisfaction among shippers, ignore completely the basic policy of the Act, as expressly declared by Congress. As pointed out above (pp. 34-35), the Commission, in applying the statutory standard of "public convenience and necessity," must be guided by the declared policy of the Act and must construe that standard in the light of and in a manner consistent with that policy. The declared policy of Congress is to "*promote* * * * economical and efficient service * * * to the end of *developing, coordinating* and *preserving* a national transportation system."

Thus, the keynote of this policy is "promotion," and "development"—in other words, improvement and betterment—of transportation. It is not a policy simply of keeping the transportation system from breaking down, or preventing it from becoming so bad that shippers become dissatisfied and clamor for change. On the contrary, it is expressly declared to be a policy of taking all possible steps to improve and better and develop the transportation system, to increase and enhance the economy and efficiency of transportation service. This policy is not a static one; it is a growing and progressive policy, looking towards constant advancement in the art of transportation and in the service which that art makes available to the users of transportation. Protestants' contention in

this respect is completely answered by the language of Mr. Justice Rutledge in the *McLean Trucking Co.* case, already quoted (p. 53 above), to the effect that "the Motor Carrier Act is to be administered with an eye to *affirmatively improving transportation facilities, not merely to preserving existing arrangements.*" (Emphasis supplied.) As the Commission aptly put the matter in the first *Kansas City S. Transport Co.* case, (see p. 44 above), "the public ought not to be deprived of the benefit of an improved service merely because it may divert some traffic from other carriers. If that principle has been followed, indeed, no motor carrier service could have been developed."

Plainly, protestants' contention—and the decision of the court below upholding that contention—would result in a transportation policy that would freeze "existing arrangements" and methods of transportation, and would keep them frozen until the public outcry for a change became irresistible. Such a policy would obviously constitute a complete frustration of the expressed Congressional preference for progressive advancement and improvement in the transportation system.

B. Error of Assuming That a Railroad May not be Permitted to Use its Own or its Subsidiary's Motor Vehicles for the Better Performance of its Railroad Service Unless Facilities of Existing Independent Motor Carriers for Supplying Motor Carrier Service are Shown to be Inadequate.

Implicit in the protestants' position is the assumption that a railroad must not be permitted to use either its own motor vehicles or the motor vehicles of its motor carrier subsidiary for the performance of a railroad service, so long as there are existing independent motor carriers with enough trucks and other physical facilities for hauling the freight in question.

This assumption likewise ignores the declared policy

of Congress that the transportation system shall be developed, improved and bettered, and not merely kept in a static condition. Protestants disregard the fact that the proposed substituted service merely constitutes a facility for performing in a new and improved manner a service which is already being rendered by the railroad and which the railroad is obligated by law to continue to render in some manner, viz., the transportation of less-than-carload freight to and from local stations on its line. All that is sought is an improvement in the method of furnishing this service, which must somehow be furnished in any event. Protestants would compel the railroad to choose between either continuing to furnish this service by means of the wasteful and inefficient "peddler" car method or furnishing it in a manner which would not provide the greatest possibility of efficiency and well-coordinated operation, and would probably result in impairment rather than improvement of the railroad's service (see pp. 7, 53-54 above). To place upon the railroad the compulsion of such a choice would thwart rather than further the declared Congressional policy of advancing and bettering the transportation art and of encouraging the coordinated use of various types of facilities for that purpose.

This assumption by protestants likewise ignores the express provisions of the Act. At the time when, prior to the enactment of the Motor Carrier Act of 1935, Congress was considering what provisions should be included in that Act, representatives of the motor carrier industry strongly urged that railroads should be excluded entirely from the field of motor vehicle operations and should not be permitted to acquire control of or operate any motor carrier at all. This suggestion was definitely rejected by Congress when it enacted the Act. In Section 213 (a) of the Act—originally included in the Motor Carrier Act but subsequently merged with other consolidation and acquisition provisions into the present Section 5 of the Interstate Commerce Act (see pp. 25-26 above)—

Congress expressly provided for the acquisition and control by a railroad of a motor carrier, upon a finding by the Commission that such acquisition and control "will promote the public interest *by enabling [the railroad] to use service by motor vehicle to public advantage in its operations.*" The reasons for the inclusion of that provision in the Act were explained by Commissioner Eastman, in the Senate Hearings in 1938 on the bill proposing amendments to the Act, as follows (Hearings on S. 3606, 75th Congress, 3d Session, March, 1938, p. 23):

> "The reason for that proviso was that at the time when this act was under consideration by your committee, there was a feeling on the part of many that railroads, for example, ought not be permitted to acquire motor carriers at all. It was pointed out, in opposition to that view, that there were many cases where railroads could use motor vehicles to great advantage in their operations, in substitution for rail service, as many of them are now doing. Many railroad men, for example, feel that the operation of way trains has become obsolete; *that the motor vehicle can handle such traffic between small stations much more economically and conveniently than can be done by a way train; and the motor vehicles are being used in that way by many railroads.* The same is true of many terminal operations. The motor vehicle is a much more flexible unit than a locomotive switching cars, and it can be used to great advantage and with great economy in many railroad operations.
>
> "For that reason, something of a compromise was reached between those two opposing views, and it was provided that a railroad could acquire a motor carrier if it could make special proof that the transaction was not only consistent with the public interest but *would promote the public interest and would*

also promote the public interest in a special way, namely, by enabling such carrier other than a motor carrier to use service by motor vehicle to public advantage in its operations. And a further finding was required, that the acquisition will not unduly restrain competition." (Emphasis supplied.)

Thus, it is clear from this language of the Act and from Commissioner Eastman's explanation of it, that Congress intended that a railroad should be permitted to acquire and control a motor carrier subsidiary and use the motor vehicles of that subsidiary in conjunction with its own operations, where the Commission finds that such use of motor vehicles by a railroad would be "to public advantage." By way of illustration of what might constitute such "public advantage," from a railroad's use of a motor carrier in the railroad's operations, Commissioner Eastman cited the very type of operation involved in the present case, viz., the use of motor vehicles for handling traffic, otherwise handled in way-freight trains, between small stations on the railroad's line. In this testimony, and the testimony quoted elsewhere above (pp. 27-28), Commissioner Eastman made it clear that his own view was that it would be definitely to the public advantage to permit a railroad to substitute motor vehicle for rail handling in such operations.*

Thus, the standard which Congress has set up, as

*The same view was well expressed in the report made by Leo J. Flynn, Attorney-Examiner of the Interstate Commerce Commission, to the Commission, on the subject of "Coordination of Motor Transportation," in 1932 (published as Senate Doc. No. 43, 72nd Congress, 1st Session), in the following language (p. 101):

"If rail carriers are to participate fully in modern transportation, it will be necessary for them to operate, either directly or indirectly, motor vehicles. *While coordination may be to some extent effected between rail carriers and independently operated motor-vehicle lines, it will fall far short of what can be accomplished if the rail and the motor-vehicle operations are under one management.* The use of the established railroad organization, personnel, stations, telegraph, telephone, and other existing rail facilities in connection with motor-vehicle operations, would not only make for efficiency of service but would obviate duplications and waste." (Emphasis supplied.)

the Commission's guide for determining whether a railroad shall be permitted to acquire and use a motor carrier subsidiary in conjunction with its own railroad operations, is that which might be expected in the light of the declared general policy of the Act—viz., not a static standard, requiring the freezing of existing arrangements, but rather the standard of improvement and betterment, the standard of "public advantage," with respect to the improved efficiency of the railroad's operations. In the present case the Commission had before it the specific type of operation which was before Congress when it was considering whether or not to permit a railroad to acquire and use motor carriers for the purpose of supplementing and improving the railroad's own operations. Having that specific type of operation before it, Congress saw fit to provide expressly that a railroad could acquire and use a motor carrier in conjunction with its own operations, where the Commission found it would be of public advantage to do so. The Commission has so found in the present case, and its findings, and conclusion based thereon, clearly come within the scope of the intent and purpose of Congress, as manifested in these provisions. The contrary position of protestants, and of the court below, would plainly lead to a defeat rather than a fulfillment of the Congressional purpose.

Protestants, in contending that the application in this case must be denied unless it is found that the existing motor and rail facilities are physically inadequate to handle the freight in question, are guilty of a fundamental confusion. They have confused cases like the present one, which involve simply an attempt by a railroad to improve its own existing service through the substitution of motor for rail handling of certain freight and the use of its motor carrier subsidiary for that purpose, with the quite different type of case in which an independent motor carrier seeks to inaugurate a new service, as, for example, a general over-the-road service,

in addition to and in competition with other existing motor carriers who provide the same type of services.

In the latter type of case the Commission, in order to prevent destructive and wasteful competition by the introduction of a wholly new service, in duplication of and in addition to existing services where those existing services are adequate to take care of the business offered, has established, as one of the tests which must be met, the requirement that the existing services must be shown to be inadequate. On the other hand, in the present type of case a quite different situation is presented. Here the purpose is, not to add a wholly new service in duplication of existing services, but is merely to provide a new and improved method of performing one of the already existing services, viz., the railroad service to way-stations on the railroad's line. Since the railroad will be obliged to continue to offer this service in any event, whether or not the substituted service application is granted, and since the only question therefore is whether it shall be required to perform that service by rail movement or shall be permitted to use motor vehicles in the performance thereof, it follows that the test of adequacy of existing services is not appropriate because there is no proposal to add to the existing services, but only a proposal to change the method of performing one of them.

Despite this fact, the Commission, out of excessive caution and as a part of its established policy for handling these substituted service cases, insists on an additional showing with respect to whether or not the proposed service could be satisfactorily furnished by existing motor carriers. However, it quite properly does not require a showing of the physical inadequacy of existing motor carrier facilities to carry the freight in question, as a condition of permitting the substitution of facilities, but, on the contrary, regards its requirement in this respect as being satisfied, where the application is made by a motor carrier subsidiary of a railroad, by the fact that an arrangement with the existing independent motor carriers to provide substituted motor service would not be likely

to result in as efficient and economical coordination and synchronization of the rail and motor portions of the service, and might result in impairment rather than improvement of the railroad's over-all service (see pp. 43, 47-54 above). In this respect the Commission's policy again looks to the advancement and improvement of the transportation art as the ultimate test to be applied, and is therefore fully in accord with the policy and purpose of the Act.

C. Protestants' Position Would Lead to the Stifling Rather than the Encouraging of Healthy Competition.

There is no doubt that Congress, in furtherance of its policy of advancing and improving the art of transportation, intended that competition within the transportation field should be encouraged, within reasonable limits and subject to the Commission's power to prevent and eliminate wasteful and destructive competition. That policy is made manifest, with respect to the specific type of situation here involved, by the provision at the end of the language quoted above from what was formerly Section 213 (a) and is now embraced within Section 5 of the Act, to the effect that the Commission may permit a railroad to acquire and use a motor carrier where the railroad's use of the motor carrier in the railroad's operations will not only be to the public advantage but will not "unduly restrain competition."

It is clear in the present type of situation that it is the Commission's established policy, as applied in its order in the instant case, which is on the side of preserving and encouraging competition, while the position of the protestants would result in the stifling and lessening of competition. As already pointed out (pp. 53-54 above), the granting of permission to a railroad to improve its handling of less-than-carload freight traffic

through the substitution of motor for rail movement thereof and the use of its motor carrier subsidiary for that purpose, results in a betterment of the railroad's service from the standpoint of the public and therefore in a sharpening of the competition between the railroad's service, on the one hand, and the competing services of independent motor carriers, on the other. Protestants' contention, however, would require the railroad to make arrangements with independent motor carriers which would not only not provide the maximum possibility of increased efficiency and economy in the railroad's service, but, more importantly, would place such independent motor carriers in a position where, as competitors with the railroad's over-all transportation service, they could stifle and suppress the competitive impact of the railroad's service by giving operating preference to their own service rather than to that portion of the railroad's service which was assigned to them for performance.

Thus it is clear that the policy which the Commission has, after careful consideration, developed and established for handling applications of the character here involved, and which it has applied in this case, is fully in accord with and in furtherance of the provisions of the Act and the declared policy of Congress as expressed therein, in that it is designed for the promotion of improved transportation service and the advancement and betterment of the transportation art, and at the same time for a sounder and more healthy competition between the different agencies of transportation. On the other hand, the position of the protestants, and the decision of the court below sustaining that position, would result in the hindering and impeding of the development of the transportation system and the improvement of the transportation art, and in the stifling or deadening of healthy competition in the transportation field, and would therefore frustrate rather than carry out the policy and provisions of the Act.

CONCLUSION.

For the reasons stated above, it is submitted that the judgment of the court below, enjoining and setting aside the Commission's order of September 25, 1943, should be reversed, and the complaint should be dismissed.

Respectfully submitted,

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MARCH 1, 1945.

APPENDIX.

Excerpts from the Interstate Commerce Act.

A. *Excerpts from Motor Carrier Act of August 1, 1935, c. 498, 49 Stat. 543, 551, 555-56.*

"Sec. 202. (a) It is hereby declared to be the policy of Congress to regulate transportation by motor carriers in such manner as to recognize and preserve the inherent advantages of, and foster sound economic conditions in, such transportation and among such carriers in the public interest; promote adequate, economical, and efficient service by motor carriers, and reasonable charges therefor, without unjust discriminations, undue preferences or advantages, and unfair or destructive competitive practices; improve the relations between, and coordinate transportation by and regulation of, motor carriers and other carriers; develop and preserve a highway transportation system properly adapted to the needs of the commerce of the United States and of the national defense; and cooperate with the several States and the duly authorized officials thereof; and with any organization of motor carriers in the administration and enforcement of this part.

"(b) The provisions of this part apply to the transportation of passengers or property by motor carriers engaged in interstate or foreign commerce and to the procurement of and the provision of facilities for such transportation, and the regulation of such transportation, and of the procurement thereof, and the provision of facilities therefor, is hereby vested in the Interstate Commerce Commission."

"Sec. 206. (a) No common carrier by motor vehicle subject to the provisions of this part shall engage in any interstate or foreign operation on any public highway, or within any reservation under the exclusive juris-

diction of the United States, unless there is in force with respect to such carrier a certificate of public convenience and necessity issued by the Commission authorizing such operations: *Provided, however,* That, subject to section 210, if any such carrier or predecessor in interest was in bona fide operation as a common carrier by motor vehicle on June 1, 1935, over the route or routes or within the territory for which application is made and has so operated since that time, or if engaged in furnishing seasonal service only, was in bona fide operation on June 1, 1935, during the season ordinarily covered by its operation, except in either instance as to interruptions of service over which the applicant or its predecessor in interest had no control, the Commission shall issue such certificate without requiring further proof that public convenience and necessity will be served by such operation, and without further proceedings, if application for such certificate is made to the Commission as provided in paragraph (b) of this section and within one hundred and twenty days after this section shall take effect, and if such carrier was registered on June 1, 1935, under any code of fair competition requiring registration, the fact of registration shall be evidence of bona fide operation to be considered in connection with the issuance of such certificate. Otherwise the application for such certificate shall be decided in accordance with the procedure provided for in section 207(a) of this part and such certificate shall be issued or denied accordingly. Pending the determination of any such application the continuance of such operation shall be lawful: *And provided further,* That this paragraph shall not be so construed as to require any such carrier lawfully engaged in operation solely within any State to obtain from the Commission a certificate authorizing the transportation by such carrier of passengers or property in interstate or foreign commerce between places within such State if there be a board in such State having authority to grant or approve such

certificates and if such carrier has obtained such certificate from such board. Such transportation shall, however, be otherwise subject to the jurisdiction of the Commission under this part.

"(b) Application for certificates shall be made in writing to the Commission, be verified under oath, and shall be in such form and contain such information and be accompanied by proof of service upon such interested parties as the Commission shall, by regulation, require. Any person, not included within the provisions of paragraph (a) of this section, who or which is engaged in transportation in interstate or foreign commerce as a common carrier by motor vehicle when this section takes effect may continue such operation for a period of one hundred and twenty days thereafter without a certificate and, if application for such certificate is made to the Commission within such period, the carrier may, under such regulations as the Commission shall prescribe, continue such operation until otherwise ordered by the Commission."

"Sec. 207. (a) Subject to section 210, a certificate shall be issued to any qualified applicant therefor, authorizing the whole or any part of the operations covered by the application, if it is found that the applicant is fit, willing, and able properly to perform the service proposed and to conform to the provisions of this part and the requirements, rules, and regulations of the Commission thereunder, and that the proposed service, to the extent to be authorized by the certificate, is or will be required by the present or future public convenience and necessity; otherwise such application shall be denied: *Provided, however*, That no such certificate shall be issued to any common carrier of passengers by motor vehicle for operations over other than a regular route or routes, and between fixed termini, except as such carriers may be authorized to engage in special or charter operations.

"(b) No certificate issued under this part shall confer any proprietary or property rights in the use of the public highways."

"Sec. 213. (a) It shall be lawful, under the conditions specified below, but under no other conditions, for two or more motor carriers which are not also carriers by railroad to consolidate or merge their properties, or any part thereof, into one corporation for the ownership, management, and/or operation of the properties theretofore in separate ownership; or for any such motor carrier or two or more such carriers jointly, to purchase, lease, or contract to operate the properties, or any part thereof, of another such carrier; or for any such motor carrier or two or more such carriers jointly, to acquire control of another such carrier through purchase of its stock; or for a person which is not a motor carrier or a carrier by railroad, or express, or water to acquire control of two or more motor carriers through ownership of their stock; or for any such person which has control of one or more motor carriers to acquire control of another such carrier through ownership of its stock; or for a carrier by railroad, express, or water to consolidate, or merge with, or acquire control of, any motor carrier or to purchase, lease, or contract to operate its properties, or any part thereof.

"(1) Whenever a consolidation, merger, purchase, lease, operating contract, or acquisition of control is proposed under this section, the carrier or carriers or the person seeking authority therefor shall present an application to the Commission, and thereupon the Commission shall notify the Governor of each State in which any part of the properties or operations of the carriers involved in the proposed transaction is situated, and also such carriers and the applicant or applicants, and other parties known to have a substantial interest in the proceeding, of the time and place for a public hearing. If after such hearing the Commission finds that the transaction pro-

posed will be consistent with the public interest and that the conditions of this section have been or will be fulfilled, it may enter an order approving and authorizing such consolidation, merger, purchase, lease, operating contract, or acquisition of control, upon such terms and conditions as it shall find to be just and reasonable and with such modifications as it may prescribe: *Provided, however,* That if a carrier other than a motor carrier is an applicant, or any person which is controlled by such a carrier other than a motor carrier, or affiliated therewith within the meaning of section 5(8) of part I, the Commission shall not enter such an order unless it finds that the transaction proposed will promote the public interest by enabling such carrier other than a motor carrier to use service by motor vehicle to public advantage in its operations and will not unduly restrain competition.

"(2) Whenever a person which is not a motor carrier is authorized, by an order entered under subparagraph (1) of this section, to acquire control of any such carrier or of two or more such carriers, such person thereafter shall, to the extent provided by the Commission, for the purposes of section 204 (a) (1), and section 220 (a) and (b), relating to accounts, records, and reports, and to the inspection of facilities and records, including the penalties applicable in the case of violations thereof, be subject to the provisions of this part."

B. *Excerpts from Transportation Act of September 18, 1940, c. 722, 54 Stat. 899, 902-3, 920, 924.*

"Section 1. The Act entitled 'An Act to regulate commerce,' approved February 4, 1887, as amended (U. S. C., 1934 edition, title 49, secs. 1-27; Supp. IV, title 49, secs. 3, 6, 11, 15, 18, 21, 22, 25, 26, 301-327), is amended by inserting before part I the following:

'*Short Title.*

'This Act may be cited as the Interstate Commerce Act.

'*National Transportation Policy.*

'It is hereby declared to be the national transportation policy of the Congress to provide for fair and impartial regulation of all modes of transportation subject to the provisions of this Act, so administered as to recognize and preserve the inherent advantages of each; to promote safe, adequate, economical, and efficient service and foster sound economic conditions in transportation and among the several carriers; to encourage the establishment and maintenance of reasonable charges for transportation services, without unjust discriminations, undue preference or advantages, or unfair or destructive competitive practices; to cooperate with the several States and the duly authorized officials thereof; and to encourage fair wages and equitable working conditions;—all to the end of developing, coordinating, and preserving a national transportation system by water, highway, and rail, as well as other means, adequate to meet the needs of the commerce of the United States, of the Postal Service, and of the national defense. All of the provisions of this Act shall be administered and enforced with a view to carrying out the above declaration of policy'.''

''Sec. 7. Section 5 of the Interstate Commerce Act, as amended, is amended to read as follows:

'Sec. 5. (1) • • •.

'(2)(a) It shall be lawful, with the approval and authorization of the Commission, as provided in subdivision (b)—

'(i) for two or more carriers to consolidate or merge their properties or franchises, or any part thereof, into one corporation for the ownership, management,

and operation of the properties theretofore in separate ownership; or for any carrier, or two or more carriers jointly, to purchase, lease, or contract to operate the properties, or any part thereof, of another; or for any carrier, or two or more carriers jointly, to acquire control of another through ownership of its stock or otherwise; or for a person which is not a carrier to acquire control of two or more carriers through ownership of their stock or otherwise; or for a person which is not a carrier and which has control of one or more carriers to acquire control of another carrier through ownership of its stock or otherwise; or

'(ii) for a carrier by railroad to acquire trackage rights over, or joint ownership in or joint use of, any railroad line or lines owned or operated by any other such carrier, and terminals coincidental thereto.

'(b) Whenever a transaction is proposed under subparagraph (a), the carrier or carriers or person seeking authority therefor shall present an application to the Commission, and thereupon the Commission shall notify the Governor of each State in which any part of the properties of the carriers involved in the proposed transaction is situated, and also such carriers and the applicant or applicants (and, in case carriers by motor vehicle are involved, the persons specified in section 205 (e)), and shall afford reasonable opportunity for interested parties to be heard. If the Commission shall consider it necessary in order to determine whether the findings specified below may properly be made, it shall set said application for public hearing, and a public hearing shall be held in all cases where carriers by railroad are involved. If the Commission finds that, subject to such terms and conditions and such modifications as it shall find to be just and reasonable, the proposed transaction is within the scope of subparagraph (a) and will be consistent with the

public interest, it shall enter an order approving and authorizing such transaction, upon the terms and conditions, and with the modifications, so found to be just and reasonable: *Provided,* That if a carrier by railroad subject to this part, or any person which is controlled by such a carrier, or affiliated therewith within the meaning of paragraph (6), is an applicant in the case of any such proposed transaction involving a motor carrier, the Commission shall not enter such an order unless it finds that the transaction proposed will be consistent with the pubic interest and will enable such carrier to use service by motor vehicle to public advantage in its operations and will not unduly restrain competition'."

"Sec. 17. (a) Section 202 of the Interstate Commerce Act, as amended (which relates to the scope of the application of part II), is amended——

(1) by striking out the heading thereof, 'DECLARATION OF POLICY AND DELEGATION OF JURISDICTION', and inserting in lieu thereof a new heading as follows: 'APPLICATION OF PROVISIONS'; and

(2) by repealing subsection (a) of such section, by striking out '(b)' and inserting in lieu thereof '(a)', and by striking out '(c)' and inserting in lieu thereof '(b)'."

"Sec. 21. (a) • • •.

• • • • • • •

"(e) Section 213 of such Act, as amended (which relates to consolidations, mergers, and acquisitions of control in case of motor carriers), is hereby repealed."